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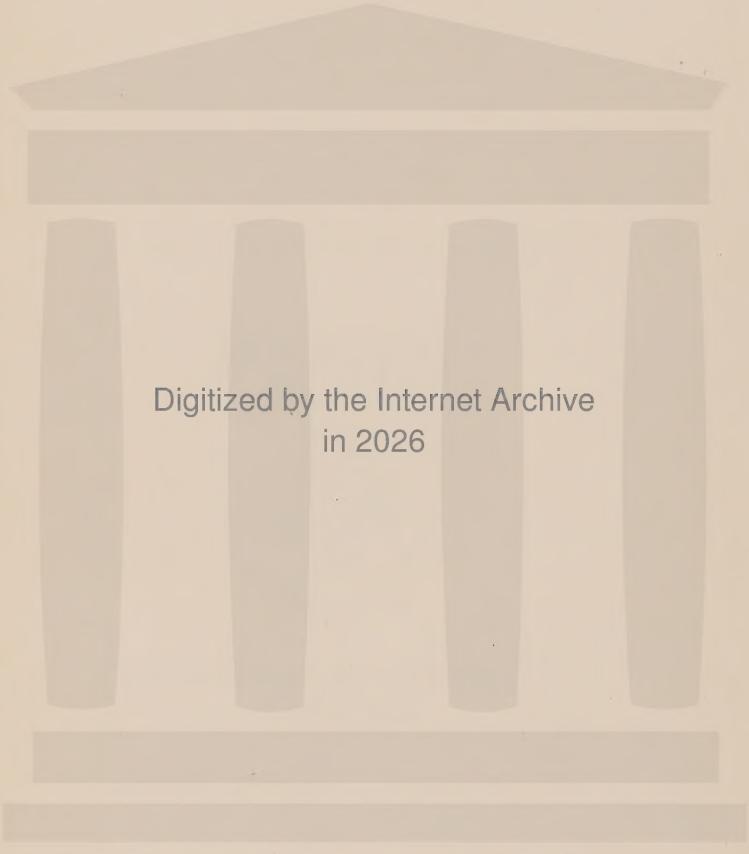
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CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

ADMIRALTY.

1916
Oct. 17, 18, 31.

THE MONTROSA.

[1915 M. 1223.]

Admiralty—Jurisdiction—Damages for Breach of Charterparty—Action in rem against Proceeds of Sale of Ship—Action begun in City of London Court—Proceeds in High Court—Transfer to High Court—No Original Jurisdiction in High Court—Service on Registrar—County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 *Vict. c.* 51), *ss.* 1, 3.

By virtue of ss. 1 and 3 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, a county court possessing admiralty jurisdiction has jurisdiction to entertain an action in rem for breach of charterparty. There is no similar jurisdiction in the Admiralty Division of the High Court.

An action in rem for damages for breach of charterparty was begun in the City of London Court against "the owners of the proceeds of sale of the sailing vessel *M.*, now in the High Court of Justice, Admiralty Division, within the jurisdiction of this Honourable Court." The summons was served on the Admiralty Registrar as the custodian of the proceeds, and by a summons

1916

THE MONTROSA.

taken out in the Admiralty Division of the High Court the action was forthwith transferred to that Division:—

Held, (1.), that, although the ship had been sold before the institution of the action, the proceeds represented the res and the City of London Court had jurisdiction to entertain an action against the proceeds notwithstanding that they were in the High Court; (2.) that service on the Admiralty Registrar was good service and in accordance with admiralty practice; and (3.) (following *The Swan* (1870) L. R. 3 A. & E. 314) that the Admiralty Court by transfer acquired jurisdiction to hear and determine the action although it could not have been instituted there originally.

ACTION FOR DAMAGES FOR BREACH OF CHARTERPARTY.

By a charterparty dated March 16, 1915, it was agreed between the plaintiffs, John E. Moore & Co., Limited, merchants, of St. John's, New Brunswick, and M. Eriksson, the then owner of the Russian sailing ship *Montrosa*, that the *Montrosa* should proceed to Halifax, Picton, or Pugwash, as ordered before leaving England, and should there load a cargo of deals and/or battens and deliver them in the United Kingdom at a port ordered on signing bills of lading and on payment of freight at 5*l.* 15*s.* per standard. In pursuance of the charterparty the *Montrosa* was ordered to proceed to Pugwash. She left Goole for Pugwash in May, 1915, and in the course of the voyage was abandoned by her crew, who reported that she had struck a mine. On June 1 she was picked up by salvors and taken to Hull. The salvors brought an action against her in the Admiralty Division for salvage, and on August 12 she was sold by order of the Admiralty Court, and the proceeds, 2350*l.*, were paid into Court. The same day the Russian shipowner repudiated the charterparty.

On October 21 the plaintiffs commenced the present action in the City of London Court, the defendants being "the owners of the proceeds of sale of the sailing vessel *Montrosa*, now in the High Court of Justice, Admiralty Division, within the jurisdiction of this Honourable Court." According to the indorsement on the summons the claim was for "300*l.* damages for breach of charterparty dated March 16, 1915, made between the plaintiffs and the owner of the sailing vessel *Montrosa* for the use or hire of the said sailing vessel." This summons was served on the Admiralty Registrar as the custodian of the proceeds of sale. On October 22

the plaintiffs took out a summons in the Admiralty Division of the High Court to transfer the action to that Division, and on October 27 the assistant registrar made an order for transfer forthwith. "All rights reserved to defendants, costs reserved." On November 5 an unconditional appearance was entered on behalf of the defendants.

According to the statement of claim delivered on November 11 the *Montrosa* was improperly abandoned. When picked up by the salvors she was leaking through two rivet holes and gradually filling with water, but otherwise she was undamaged. The leaky rivet holes were easily plugged by the salvors, and the ship did not make any more water. After arrival at Hull she was surveyed, and it was found that she had not been damaged by a mine or otherwise, but that the leaks had been caused by cutting off two rivet heads from the inside. With very slight repairs she was fit to proceed on her voyage under the charterparty, but the defendants or their servants or agents improperly abandoned the voyage and repudiated the charterparty.

On December 9 the defendants gave notice of change of solicitors, and on January 15, 1916, delivered a defence in which they alleged that two rivets had been wilfully removed by the captain and/or some members of the crew in order to allow water to enter the ship, and the completion of the voyage and the further performance of the charterparty were prevented by matters therein excepted, namely, "perils of the sea, barratry of the master and crew, arrest . . . . accidents of navigation even when occasioned by the negligence and default . . . . of the master or mariners." The defendants also pleaded that at the time of the institution of the action the owner of the vessel with whom the plaintiffs entered into the charterparty had ceased to be her owner, the vessel having been sold, and that the City of London Court had no jurisdiction to entertain the action. Further, the High Court of Admiralty had no jurisdiction to entertain an action in rem in respect of the matters in which relief was claimed.

By s. 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, any county court having admiralty jurisdiction has jurisdiction (which by s. 3 is exercisable in rem or in personam) over "(1.) any claim arising out of any agreement made in relation

1916

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to the use or hire of any ship, or in relation to the carriage of goods in any ship . . . ." There is no similar provision in the Admiralty Court Act, 1861, which was passed to "extend the jurisdiction and improve the practice of the High Court of Admiralty."

Laing, K.C., and *Balloch*, for the defendants. The Admiralty Division of the High Court of Justice has no jurisdiction to determine an action in rem for damages for breach of charterparty. Sect. 6 of the Admiralty Court Act, 1861, which gives the High Court of Admiralty jurisdiction (exercisable in rem or in personam : s. 35) over any claim by the owner or consignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods by the negligence or misconduct of, or for any breach of contract by, the owner, master, or crew of the ship, provided that no owner or part-owner is domiciled in England or Wales, does not extend to a claim by the charterers for damages for failure of the ship to proceed to the agreed port of loading : see Carver's Carriage of Goods by Sea, 5th ed., s. 688, and the cases there cited. It is admitted that, if the action was rightly instituted in the City of London Court, the Admiralty Division by the transfer would acquire jurisdiction to hear and determine the action. But, although the City of London Court has jurisdiction in rem over such a claim, the plaintiffs must show that the res is the property of the shipowner with whom they contracted. At the date of the institution of the proceedings Mr. Eriksson was no longer the owner of the *Montrosa*. If the action had proceeded in the City of London Court and the plaintiffs had obtained a judgment in their favour there would have been no means of enforcing it. Proceeds of sale under such circumstances could not be attached : cf. *The Optima*. (1) The res must be in existence. The City of London Court, therefore, had no jurisdiction, and an action which was invalid ab initio could not be transferred to the High Court. In the alternative, if the action is maintainable, the evidence establishes that the voyage was interrupted by the barratrous act of the master and crew, and the defendants are protected by the exception clause in the charter-

(1) (1905) 10 Asp. M. L. C. 147.

party. [Carver, s. 82, and *Finlay* v. *Liverpool and Great Western S.S. Co.* (1) were also referred to.]

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Bateson, K.C., and *C. R. Dunlop*, for the plaintiffs. The City of London Court had jurisdiction to entertain the action. The res is still in existence, for the proceeds of sale represent the res, and the High Court, which geographically is within the limits of the jurisdiction of the City of London Court, has the custody of the proceeds. An action directed to "the persons interested in the proceeds of the ——" is quite correct: Williams and Bruce's Admiralty Practice, 3rd ed., p. 251, note (*h*). The transfer was rightly made under s. 6 of the County Courts Admiralty Jurisdiction Act, 1868. The Court holds the proceeds for the persons entitled to them, and the plaintiffs are entitled to rank, according to priorities, among the other claimants to the fund in Court: *The Africano.* (2)

Cur. adv. vult.

Oct. 31. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—This action was originally brought in the City of London Court under the provisions of the County Courts Admiralty Jurisdiction Amendment Act, 1869. The claim was by the charterers for 300*l.* damages for breach of charterparty. By an order of this Court the action was transferred to this Division. Appearance was entered for the defendants in the High Court after the transfer. The appearance was unconditional.

The chief contest between the parties at the hearing was whether there was jurisdiction to entertain the action. Apart from this the substance of the case can be dealt with briefly. The defendants pleaded that the completion of the voyage and the further performance of the charterparty were prevented by barratry of the master and crew, which was one of the exceptions in the charterparty. The damages were also in issue.

As to the barratry plea, it is enough to say, first, that the defendants failed to prove it; and, secondly, that whenever and however the rivets were removed they could easily and promptly have been replaced, and the voyage could have been resumed. This could have been done even before the arrest in the salvage action.

(1) (1870) 23 L. T. 251. (2) [1894] P. 141.

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Moreover, after the arrest the correspondence between the plaintiffs' and the defendants' respective agents shows that it was expected that the vessel would have proceeded on her voyage in accordance with the charterparty. On July 10 the owners instructed their agents to settle the salvors' claim for 800*l.*—the sum demanded "if better impossible"—and to instruct the master to fulfil the charter if charterers insisted. The reply to this was a letter of July 12.

It was not until August 12 that the owners' agents repudiated the charterparty. On that day the vessel had been sold by this Court for 2350*l.* The proceeds were paid into Court. The salvors would have released the vessel if bail for 1000*l.* had been given. Subsequently the salvage action was settled for 600*l.* and costs.

As to the damages, the plaintiffs produced evidence which proved their loss to be considerably more than 300*l.* The defendants did not attempt to controvert the evidence. Accordingly if the Court has jurisdiction the plaintiffs have established their right to judgment for 300*l.* If it has not, the action of course fails.

This Court could not have entertained the action if it had been originally brought in this Court, because it has not been entrusted with powers like those conferred on county courts by the Act of 1869 already referred to. Why that is so I do not know. Those interested in shipping have urged the extension of the powers of this Court to enable it to decide causes arising out of agreements made in relation to the use or hire of a ship, and also in relation to the sale and purchase of ships. It seems to me to be fitting that this should be done, but that is a matter for the Legislature. But if the City of London Court had jurisdiction to entertain the action, this Court by transferring the action to itself obtained jurisdiction to hear and determine it, notwithstanding that it could not have been instituted here originally: *The Swan.* (1)

The defendants contended that there was no jurisdiction in the City of London Court because the ship had been sold and the res had therefore disappeared; and also that the service of the plaint was not properly effected. It is a fact that the vessel had been sold; but the proceeds were in this Court. The service of th summons was made on the Admiralty Registrar of this Court.

(1) L. R. 3 A. & E. 314.

Where the proceeds are in Court they represent the res, the ship itself, and the action can be brought against the proceeds: see Coote's Admiralty Practice, 2nd ed., p. 144; Williams and Bruce's Admiralty Practice, 3rd ed., p. 269; *The Dowthorpe* (1); *The Elephanta* (2); *The Proceeds of the Dora Tully* (3); *The Optima.* (4) It makes no difference, in my view, that the proceeds were in the custody of the High Court when the action was entered in the City of London Court. The essential circumstance is that they should be in Court, to be held and distributed among all persons legally interested.

It has been held that a county court can arrest a vessel already under arrest in the High Court: see *The Rio Lima* (5); although the usual practice is for the process in the county court action to be served on the ship if she is already under arrest in the High Court. I think service on the proceeds was also good service and in accordance with admiralty practice. Moreover, if there had been an irregularity in the service in the county court action, that would have been waived by the unconditional appearance in this Court after the transfer.

As the proceeds of a sale by the Court are held by the Court for all persons having rights against them, or the res which they represent, it is just that the plaintiffs should be able to rank in their proper place among the various claimants to the proceeds. The priorities of the claims will be decided in proper course hereafter.

Judgment must be entered for the plaintiffs, with costs.

Solicitors for plaintiffs: *Trinder, Capron & Co.*
Solicitors for defendants: *Thomas Cooper & Co.*

(1) (1843) 2 Notes of Cases, 264.
(2) (1851) 15 Jur. 1185.
(3) Unreported: Dec. 8, 1885.
(4) 10 Asp. M. L. C. 147.
(5) (1873) L. R. 4 A. & E. 157.

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Oct. 23, 26;
Nov. 6.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(In Prize.)

THE JEANNE; THE VERA; THE FORSVIK; THE ALBANIA.

[1915, Nos. 547, 546, 541, 615.]

Prize Court—Neutral Vessels—Contraband Cargoes—Shipowners' Claims to Freight.

Neutral shipowners are not entitled to freight in respect of the carriage of contraband.

Shipowners' Claims for Freight, &c.

The claimants in these four actions, which were tried together, were (*a*) the Dampskibsselskab Heimdal, of Copenhagen, the owners of the steamships *Jeanne* and *Vera*, and (*b*) the Förnyade Angfartyge Aktiebolaget Svenska Lloyd, of Gothenburg, the owners of the steamship *Albania* and the charterers of the steamship *Forsvik*.

In February, 1915, all four vessels were chartered by one Tycho Roberg, of Gothenburg, to load a quantity of rice at Vigo for carriage to Gothenburg. The rice had been shipped at Bangkok in the German steamship *Neuenfels* before the war, and was destined for ports in Germany. On the outbreak of war the *Neuenfels* put into Vigo and remained there, using the port as a port of refuge.

In March, 1915, under bills of lading in which the shipper was stated to be A. Cardona, of Vigo, the rice was transferred into the claimants' vessels to be delivered at Gothenburg to Tycho Roberg or order. In the course of their voyage the four vessels either put in or were diverted to British ports and the cargoes were seized as prize, but the vessels were allowed to proceed. The cargoes were sold and the proceeds, 55,850*l.*, were paid into Court. On July 3, 1916, the learned President condemned the proceeds of sale on the ground that the rice was going to the German Government or

forces and was therefore contraband. (1) The shipowners now claimed freight, expenses, and damages for detention.

1916. Oct. 23, 26. *Aspinall, K.C.*, and *C. R. Dunlop*, for the claimants the owners of the *Albania* and the charterers of the *Forsvik*. Although a neutral vessel may be condemned for carrying contraband which, reckoned either by value, weight, volume, or freight, forms more than half the cargo (*The Hakan* (2)), there is a distinction between an innocent and a guilty voyage, and if the

(1) NOTE.—In the course of his judgment the President said that until the goods were transferred from the *Neuenfels* into the four Scandinavian vessels it was clear that the goods were enemy property. There never was any genuine transfer of the property in the goods from the enemy owners to Tycho Roberg. The Scandinavian vessels really were in the position of vehicles which had been employed by the agent for the enemy and used for the purpose of completing the transit of the goods to the German ports. His Lordship was of opinion that when the goods were seized they were still enemy goods and still in transit, and that the neutral ships had been incorporated into the service of the enemy just as much as if the *Neuenfels* had got nearer to port and had used these ships as lighters in waters which were possibly not deep enough for her to go through.

His Lordship continued: I may say here that, according to the Prize Code in Germany, a transfer such as was attempted in this case of enemy goods from on board enemy vessels in the course of transit has no effect whatsoever. Under art. 20 (*c*) of the German Prize Code enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are in transit. I believe that that is perfectly good prize law, and I give effect to it in this case. The enemy owners of the property have not appeared here at all. They do not appear to make any claim that the goods were protected by the Declaration of Paris. In the claim which was put forward by Tycho Roberg he claimed the goods as a neutral—neutral goods on neutral ships—and there is no reference to the Declaration of Paris in the claim which he put forward, and no protection was sought by him on the ground of that international agreement. But if it had been I should have come to the conclusion that the Scandinavian vessels had so identified themselves with the enemy by taking a transhipment of the goods (not bought and sold in the ordinary course of business) in order to continue the transit, that no protection could be given to them, or was ever intended to be given to them, under the Declaration of Paris.

(2) [1916] P. 266.

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shipowners have no knowledge that their vessel is carrying contraband having an ultimate enemy destination, it is both equitable and logical that if the vessel is allowed to go free they should be allowed freight. (1) The decisions in the time of Lord Stowell, who refused freight to vessels carrying contraband, were all cases in which the vessels were bound to enemy ports, and therefore it might be assumed that the shipowner knew the object of the voyage: see *The Neutralitet* (2), *The Oster Risoer* (3), *The Ringende Jacob* (4), *The Jonge Tobias* (5), and Story's Notes on the Principles and Practice of Prize Courts (Pratt's ed.), pp. 92—94. Even in such cases the Court did not always penalize the shipowner by refusing freight: see *The Neptunus* (6), where freight and expenses were allowed to a neutral vessel carrying, amongst other goods, some contraband sailcloth; see also *The Ebenezer*. (7) Again, in the pre-emption cases, of which a number are reported in Hay and Marriott's Reports, the practice was to allow freight on pre-empted contraband goods: *Concordia Affinitatis* (8); *The Vryheid* (9); *Jonge Gertruyda* (10); Pyke's Law of Contraband of War (1915), p. 225; see also *The Haabet*. (11) The American practice, exemplified in the Civil War, is not very clear. In *The Peterhoff* (12) freight was refused in respect of the carriage of contraband, but in that case the master had not acted in good faith. Freight was also refused in *The Bermuda* (13) and *The Springbok* (14), but these were blockade cases.

Throughout the articles of the Declaration of London knowledge and the conduct of the master and owner are taken into consideration—e.g., art. 14: "The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade"; see also arts. 41 and 46. In the

(1) NOTE.—The arguments were heard before the judgment in *The Maracaibo* [1916] P. 266, 284, was delivered.

(2) (1801) 3 C. Rob. 295; 1 Eng. P. C. 309.

(3) (1802) 4 C. Rob. 199; 1 Eng. P. C. 382.

(4) (1798) 1 C. Rob. 89; 1 Eng. P. C. 60.

(5) (1799) 1 C. Rob. 329; 1 Eng. P. C. 146.

(6) (1800) 3 C. Rob. 108; 1 Eng. P. C. 264.

(7) (1806) 6 C. Rob. 250.

(8) (1778) Hay & Marriott, 169.

(9) (1778) Hay & Marriott, 188.

(10) (1779) Hay & Marriott, 246.

(11) (1800) 2 C. Rob. 174; 1 Eng. P. C. 212.

(12) (1866) 5 Wall. 28.

(13) (1865) 3 Wall. 514.

(14) (1866) 5 Wall. 1.

present case the claimants had no knowledge that their vessels were engaged in a voyage the ultimate object of which was to import contraband into Germany, and their claim to freight should be allowed. [Reference was also made to *The Doelwyk* (1), a decision of the Italian Prize Court.]

[THE PRESIDENT referred to *The Commercen.* (2)]

R. A. Wright and *Le Quesne*, for the claimants the owners of the *Jeanne* and the *Vera*, adopted the same arguments, and in addition cited *The America.* (3)

Sir Maurice Hill, K.C. (with him *Pilcher* in the cases of *The Jeanne* and *The Vera*, and *T. H. T. Case* in the cases of *The Forsvik* and *The Albania*), for the Procurator-General. The true principle is that no freight is due if in fact, whether the shipowner knew it or not, the cargo is proved to have had a contraband destination. The shipowner runs the risk. If there was no deterrent it would be an incentive to the shipowner to carry contraband. It is really the same question was was argued in *The Maracaibo.* (4) In the old cases the rule always was that the shipowner did not get freight, and the principle was applied not only to cases of contraband where knowledge on the part of the shipowner perhaps might be assumed, but also to cases where there was no knowledge—e.g., *The Rapid* (5), where freight was forfeited in consequence of the vessel, unknown to the master, having on board despatches for the enemy. In *The Neptunus* (6), on which the claimants rely, freight was allowed on a very small quantity of contraband carried with a quantity of innocent goods. It was really a case of "de minimis non curat lex." It is not suggested that the rule is a binding rule which the Court *must* apply. The Court has a discretion which it can exercise in exceptional circumstances. The argument that in the cases decided in the time of Lord Stowell the doctrine of continuous voyage did not exist does not apply to the cases decided during the American Civil War. In *The Peterhoff* (7), where the

(1) (1896) Pitt Cobbett's Cases on International Law, Part II., p. 476.

(2) (1816) 1 Wheat. 382.

(3) (1799) 3 C. Rob. 36; 1 Eng. P. C. 127, n.

(4) [1916] P. 266, 284; see note (1), p. 10, ante.

(5) (1810) Edw. 228; 2 Eng. P. C. 45.

(6) 3 C. Rob. 108; 1 Eng. P. C. 264.

(7) 5 Wall. 28.

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cargo was only contraband because it had an ultimate enemy destination, it was considered as settled law that the shipowner was not entitled to freight; see also Wheaton's International Law, 8th ed. by Dana, pp. 663 and 664, and the more recent case of *The Mashona* (1), decided during the South African War.

[THE PRESIDENT referred to Moore's International Law Digest, vol. 7, s. 1263, and the cases of *The Atlantic*, *The Juno*, *The Lucy*, and *The Bird* there cited.]

Cur. adv. vult.

Nov. 6. THE PRESIDENT (SIR SAMUEL EVANS). In these cases the shipowners put forward claims for freight in respect of contraband goods carried on the respective neutral vessels. The facts were very fully laid before the Court on a previous hearing by Sir Maurice Hill for the Procurator-General, and he and Mr. Aspinall, for the claimants, dealt very exhaustively with the law. Mr. Aspinall's argument was that freight ought to be paid except where the owners had knowledge of the contraband nature of the goods.

I think it is clear from all the authorities and text-books that freight is never paid to neutrals in respect of the carriage of contraband except as a matter of grace or as a matter of discretion. In an American case, *The Commercen* (2), Mr. Wheaton in the head-note states the rule thus: "Freight is never due to the neutral carrier of contraband"; and in his note at p. 394 of the report he says: "Freight and expenses are almost always refused by the British Prize Courts to a carrier of contraband. There is but one case in the books of an exception to this rule, which was of sailcloth carried to Amsterdam, the contraband being in a small quantity amongst a variety of other articles"—that is *The Neptunus*. (3)

Later, in America the point was definitely and specifically decided in the case of *The Peterhoff* (4), where freight was refused although knowledge was negatived. It is clear also from the deliberations of the representatives of the various Powers at the Conference of London that it was assumed that freight was never payable in respect of contraband. I cannot find that the rule has

(1) (1900) 17 Cape S. C. 135.
(2) 1 Wheat. 382.
(3) 3 C. Rob. 108; 1 Eng. P. C. 264.
(4) 5 Wall. 28.

ever been doubted. This being the rule, it is not necessary for me to waste time in a statement of the facts; but it must not be assumed that I find in this case that the owners and master were unaware of the ownership in, and the destination of, the contraband goods which they carried after transhipment from the self-interned German vessel.

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The claims are disallowed with costs.

Liberty to admit appeals within two months; security 250l. in each case.

Solicitors for claimants in the cases of *The Jeanne* and *The Vera: Botterell & Roche.*

Solicitors for claimants in the cases of *The Forsvik* and *The Albania: Thomas Cooper & Co.*

Solicitor for the Procurator-General: *Treasury Solicitor.*

E. C. T.

ADMIRALTY.

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Nov. 17, 23.

THE FANCY.

[1914 E. 1280.]

Admiralty—Collision—Patrol Steamer intercepting Steamship—Application of the "Crossing Rule"—Regulations for Preventing Collisions at Sea, 1897, *arts.* 19, 21, 29.

The defendants' steamship *F.*, bound up the Bristol Channel, came into collision with the plaintiffs' patrol steamer *E.*, which was about to speak her and was exhibiting lights indicating that she was on patrol duty. The vessels were on crossing courses, and the *F.*, having the *E.* on her own starboard side, under art. 19 of the Regulations for Preventing Collisions at Sea, had the duty of keeping out of the way.

It was contended on behalf of the *F.* that in the special circumstances, the object being not to keep out of the way but to come within hailing distance, art. 19 did not apply, and that the case was governed solely by art. 29 (the "good seamanship" rule):—

Held, that art. 19 applied, and that, in failing to take proper steps to keep clear of the *E.*, the *F.* was to blame; but that the *E.*,

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as the "keep course and speed" vessel, was also to blame for altering her course and speed; and that the blame must be distributed in the proportion of three fourths to the *F.* and one fourth to the *E.*

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Eirene.* The defendants were the owners of the steamship *Fancy.*

On October 9, 1914, about 7.30 P.M., the weather being fine and clear, and the wind N.E. to E.N.E., a light breeze, the *Eirene*, a screw steamship of 67 tons gross register, 75 feet in length, and manned by a crew of nine hands, was in the Bristol Channel near the Welsh Hook Buoy engaged on examination duty. She was exhibiting, in addition to the regulation under-way lights and a stern light, three vertical white lights indicating that she was on patrol duty. She was heading about N.W., making about four knots with engines working at half speed, when the masthead light and shortly afterwards the green light of a steamship were observed distant about four miles and bearing about four points on the port bow. These proved to be the lights of the *Fancy*, an iron screw steamship of the port of Tonsberg, Norway, of 1612 tons gross register, 260 feet long, manned by a crew of nineteen hands, which was proceeding up the Bristol Channel in charge of a duly licensed pilot in the course of a voyage from Hernosund, Sweden, to Sharpness with a cargo of timber.

According to the statement of claim, the *Eirene* kept her course and speed, carefully watching the lights of the approaching vessel until she had come so close without taking any steps to keep clear that collision could not be avoided by her action alone, when the engines of the *Eirene* were put full speed ahead and her helm hard-a-port as the only possible means of avoiding collision; but the *Fancy* continued on at high speed and with her stem struck the port side of the *Eirene*, doing so much damage that the *Eirene* sank soon afterwards.

The plaintiffs alleged that those on board the *Fancy* negligently failed to keep clear of the *Eirene;* failed to port the helm or to ease, stop, or reverse in due time; and failed to comply with arts. 19, 22, 23, and 29 of the Regulations for Preventing Collisions at Sea.

The case for the *Fancy* was that she was heading about E. $\frac{3}{4}$ N.,

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making about six knots, when those on board observed, distant about one and a half miles and bearing about two points on the starboard bow, the masthead and red lights and the three vertical white lights of the *Eirene*. The *Fancy* kept her course, and as the *Eirene* approached for the purpose of speaking the *Fancy*, the latter's whistle was sounded the local pilot's signal of three long blasts to inform those on board the *Eirene* that the *Fancy* was bound to Sharpness. As the *Eirene* came nearer it was seen that, instead of rounding up on the starboard side of the *Fancy*, as it was expected she would do, she was shaping to cross the bows of the *Fancy* and appeared to be increasing her speed. The engines of the *Fancy* were thereupon put full speed astern and her helm hard-a-port, but the *Eirene* came on and with her port side about amidships struck the stem of the *Fancy*, causing her damage for which the defendants counterclaimed.

The defendants alleged that the *Eirene* failed to keep clear of the *Fancy* when approaching to speak her; neglected to follow the usual and ordinary and the seamanlike practice of rounding to on her side; improperly and at an improper time increased her speed and attempted to cross the bows of the *Fancy*; and failed to comply with arts. 27, 28, and 29 of the Regulations for Preventing Collisions at Sea.

1916. Nov. 17. *Bateson*, *K.C.*, and *Noad*, for the plaintiffs. At the material time the vessels were on crossing courses so as to involve risk of collision within the meaning of art. 19 of the Regulations for Preventing Collisions at Sea. The *Fancy*, therefore, should have kept clear of the *Eirene* and is to blame for not doing so. No "special circumstances" existed in this case entitling the *Fancy* to disregard the crossing rule. *The Ada*; *The Sappho* (1) and *The Albano* (2) both decided that the crossing rule applies when two vessels are approaching a place where they propose to take up a pilot; and it is submitted that there is no distinction between that case and the case of a patrol boat proceeding towards a steamer in order to speak her. The sole question is whether the *Eirene*, in not keeping her course and speed in accordance with art. 21, is also to blame. It was the duty of the *Fancy* to avoid

(1) (1873) 2 Asp. M. L. C. 4. (2) [1907] A. C. 193.

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crossing ahead of the *Eirene* (art. 22), and in increasing her speed and porting her helm the *Eirene* took the right action, as it tended to assist the *Fancy* to pass under the *Eirene's* stern. The *Eirene's* navigation is therefore justified under the note to art. 21.

Laing, K.C., and *D. Stephens*, for the defendants. The *Eirene* was coming out to speak the *Fancy* and both vessels acted on that assumption. Art. 19, therefore, does not apply. The *Fancy* did not owe the *Eirene* any duty to keep out of her way, for the two vessels were trying to come close together; the case is governed solely by the rules of good seamanship (art. 29). The *Eirene* was engaged in a nautical manœuvre well known to both parties, and the case comes within the principles laid down in *The Roanoke*. (1) The sole blame for the collision rests with the *Eirene* for porting across the bows of the *Fancy* instead of rounding to on her starboard side.

Bateson, K.C., replied.

Cur. adv. vult.

Nov. 23. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—The collision in this case happened in the Bristol Channel off Walton Bay.

The *Eirene* was a small steamship engaged in patrol duty. The *Fancy* was a Norwegian steamship of 1612 tons gross register, laden with timber, and proceeding on her voyage up the channel towards Sharpness. The patrol vessel sank in a few minutes after the collision; but, fortunately, all her crew were saved.

The Eirene at the material times was in the sole charge of a second mate. He not only had to navigate her, but also steered at the wheel. The *Fancy* was navigated by a Sharpness pilot.

The collision happened in the early days of the war—about two months after its outbreak.

The *Eirene* had been ordered by the examination officer to "head off the steamer coming up channel," namely, the *Fancy*. The second mate accordingly proceeded with the engines at half speed towards the up-coming steamer. The latter's speed was not far from double that of the patrol vessel. The patrol vessel showed, in addition to the regulation navigating lights, three white lights

(1) [1908] P. 231.

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placed vertically indicating that she was on patrol duty. The two vessels were on converging courses, and would in the ordinary way be crossing vessels. As such the *Fancy* would have the duty of keeping out of the way of the *Eirene*, which was on her starboard side, and the *Eirene* the correlative duty of keeping course and speed. But it was contended for the *Fancy* that, in the special circumstances, the international rules as to crossing vessels did not apply.

At the time of the accident no special regulations, instructions, or notices as to signals or methods of approach, as between patrol vessels whose duty it was to make examinations and vessels who would be subject to examination, seem to have been made or given. And I have no information that any such exist now.

The case is therefore of importance to those engaged in the navigation of mercantile ships and of Government vessels.

It was assumed, and correctly assumed, by the pilot of the *Fancy* that the *Eirene* was proceeding on her way towards her to speak her. That was in fact the object of the *Eirene* at the time. But it might not have been. She might have been performing some other work in pursuance of her duties. She was no doubt engaged in special work, and in this sense some special circumstances existed. But in the interest of safety some rules of navigation must apply; and what others should be substituted for the old and well-established international sea rules? Canons of good seamanship would be too general to govern the conduct of vessels in all cases. This does not mean that effect is not to be given in proper cases to the provisions of art. 29, which is generally referred to as the "good seamanship" article.

I deem it my duty to hold that the rules as to crossing ships applied to these two vessels, notwithstanding the special character of the work of the patrol ship.

The *Fancy's* pilot and officers said they "expected" that the *Eirene* would round-to on the starboard side of the vessel under a port helm in order to speak her. There was no obligation upon the *Eirene* to adopt that manœuvre; and the *Fancy* had no right to act in contravention of rules under the expectation or impression that she would do so—certainly not without some definite indication from the *Eirene* that her manœuvres would be other than those

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of a crossing vessel. It was admitted that the *Fancy* did not take steps to keep out of the way of the *Eirene*. It is strange that the pilot did not even take off any of her speed in order to enable the *Eirene* to do what he says he expected. She kept her full speed until the last, although if the orders "full speed astern" and "hard-a-port" had been given only some few seconds earlier the collision might have been avoided. In thus failing to take the proper steps to keep out of the way of the crossing vessel on her starboard side the *Fancy* must be held to be in fault and must bear blame for the collision.

Even if the prescribed rules did not apply, in my opinion, and in that of my nautical assessors, she must be blamed for acting as she did when those on her bridge admitted they saw the *Eirene* increase her speed an appreciable time before the accident and at a considerable distance away.

Next, the navigation of the *Eirene* must be considered. Can she be exonerated? It has already been observed that the second mate, who also had to work at the wheel, was solely entrusted with the navigation of the ship. The only other person who seems to have been on deck was an A.B. on the forecastle head. I do not wish to say anything harsh about the second mate. He seemed a man of good character. He had served on coasting sailing ships for some years. But he had never served on a steamer till he joined the *Eirene* about two months before the accident. He had never before been left in sole charge. He held no certificate. He probably thought that the order to "head off" the steamer was tantamount to an order to cross her bows. His mind was not troubled by any crossing rule. It was exercised, seemingly, with one idea, namely, to get red to red to the other vessel. To try to get into this position he ordered his engines "full speed ahead" from the half speed at which his vessel had been travelling. According to the evidence of the engineer this was done some three minutes or so before the vessels collided. This receives corroboration by evidence from the *Fancy*. As there was no record of the time, and estimates of it are uncertain, it is appropriate to note that the engineer said he had increased his revolutions from 90 up to the full-speed number of 147 before the actual collision. The *Eirene* was a small vessel 75 feet in length, and she was struck amidships. Her course was

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also altered about the same time by a hard-a-port helm. The alteration of speed and course was not, in the circumstances, justified under the note to art. 21.

Under the articles which I have held to apply, this was wrong navigation for the stand-on vessel. Her case is not one of those (of which *The Roanoke* (1) affords an example) where in special circumstances the give-way ship is precluded from complaining of an alteration of speed and course by a stand-on vessel known to be pursuing her object in the ordinary course of good seamanship. If in approaching the ship to be examined the patrol vessel had reduced her speed, or even altered her course in seamanlike fashion in order to effect her expected or known object, the position would be different. The *Eirene* must also be held to blame under the rules.

I will add that, as in the case of the *Fancy* so also in the case of the *Eirene*, if considerations of good seamanship are applied, apart from the sea rules, I am of the opinion (in which my assessors also concur) that her navigation was faulty in making to cross the bows of the *Fancy* without clearly indicating that she was proceeding to the port side in order to speak her.

But the primary and main fault was that of the *Fancy*.

The blame for the unfortunate collision must be distributed in the proportions of three fourth parts to the *Fancy* and one fourth part to the *Eirene*.

Judgment will be entered on the claim and counter-claim accordingly; and there will be an order for the usual reference to the registrar and merchants.

Solicitors for plaintiffs: *William A. Crump & Son, for Gilbert Robertson, Cardiff.*

Solicitors for defendants: *Thomas Cooper & Co.*

(1) [1908] P. 231.

E. C. T.

1916
Oct. 25.

OSTICK *v.* OSTICK (The King's Proctor showing Cause).

Divorce Practice — Answer to King's Proctor's Plea — Substantial Admissions of Adultery.

Where the answer of a petitioner to the plea of the King's Proctor showing cause why a decree nisi should not be made absolute contains substantial admissions of adultery, but puts forward grounds for asking the Court to exercise its discretion in favour of the petitioner, the right course is that the petitioner begin.

On July 5, 1915, a decree nisi was pronounced, upon the petition of the wife, dissolving the marriage on the grounds of the alleged desertion and adultery of the respondent.

The King's Proctor entered an appearance and on January 17, 1916, filed his plea, alleging, inter alia, that the petitioner, in or about the months of September and October, 1904, lived and cohabited with a man named Mohrdieck at an address in Grimsby; that from about June, 1907, until about May, 1910, at an address in Hull they habitually committed adultery together; and that from about May, 1910, until about the early part of 1911, at another address in Hull they habitually committed adultery together.

The petitioner's answer contained an admission of the foregoing facts, save that, as regards the alleged stay in Grimsby, the date was wrongly stated in the plea, the correct date being about the summer of 1905; and she stated that she was unaware that there was any duty or obligation upon her to disclose her own adultery, and she did not, consequently, disclose the same or any facts connected therewith to her solicitors. She also pleaded cruelty and conduct conducing, and she prayed the Court to make the decree absolute, notwithstanding the matters contained in the King's Proctor's plea.

Upon the case being called on for hearing,

Talbot Ponsonby (*Hume Williams, K.C.*, with him) proceeded to open the case for the King's Proctor, whereupon

Shearman J. (interposing) said: I should like to settle the practice in these cases. Where the adultery alleged by the King's

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Proctor is admitted by the petitioner to the whole or a very considerable extent, but some excuse is set up and the Court is asked to exercise its discretion in the petitioner's favour, the petitioner should, in my view, begin.

Owen, for the petitioner, then called her, and, in the result,

SHEARMAN J. found that the suggestions of desertion and conduct conducing were not made out, and rescinded the decree nisi, dismissed the petition, and condemned the petitioner in the costs of the King's Proctor.

Solicitors for petitioner: *Walmsley & Stansbury.*
The King's Proctor.

H. D. G.

[DIVISIONAL COURT.]

1916
Nov. 21.

NICHOLSON *v.* NICHOLSON.

Husband and Wife—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 4—*Wilful Neglect causing Wife to leave and live separate and apart—Separation before Wilful Neglect to provide Reasonable Maintenance—Actual Physical Leaving caused by Neglect to maintain.*

There must be an actual physical departure from the particular place which constituted the matrimonial home, and such departure must be caused by neglect to provide reasonable maintenance, in order to found jurisdiction to make an order under the words "wilful neglect to provide reasonable maintenance . . . . and shall by such . . . . neglect have caused her to leave and live separately and apart from him," in s. 4 of the Summary Jurisdiction (Married Women) Act, 1895.

THIS was an appeal by the husband, James Walter Nicholson, against the decision of the justices for the petty sessional division of Gosport on May 26, 1916, whereby they found as a fact that the appellant had "been guilty of wilful neglect to provide reasonable maintenance for his wife," Rebecca Ann Nicholson, and ordered that she be no longer bound to cohabit with him and that he pay her the weekly sum of 12*s.* 6*d.*, the first payment to be made on Friday, the 2nd day of June, 1916.

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The reasons stated by the justices were :

1. That the wife's plea of fear justified her refusal to return, she at the time being in ill-health and suffering from shock.

2. That the defendant had maintained his wife by allowing the sums mentioned and her house-rent free, the sons and wife all residing together, and the allowance being treated as a joint allowance.

3. That the defendant, by ceasing those payments, had wilfully neglected to provide reasonable maintenance.

4. The defendant's refusal, by his solicitors, on May 12, 1916, caused the complainant to live separate from him by reason of such wilful neglect.

The facts were shortly these :

The parties were married in 1880, and there were six children living, all over age.

The husband was for some years the master of a vessel, engaged under a Government Department.

About 1900 he met with an accident on board his ship, with the result that he was found insane and taken to the Hampshire County Asylum. The parties were then living at 25, Avenue Road, Gosport.

At that time he owned some property in Gosport, and the wife drew the rents while he was in the asylum, paying a sum weekly towards his maintenance and using the balance for herself and family.

The appellant remained in the asylum until 1911, when he escaped. The wife was then still living at 25, Avenue Road, Gosport, and it appears from the notes of her evidence when before the justices that she gave that as her present address.

Apparently two meetings took place between the parties, at which the appellant made some sort of request that they should resume cohabitation, but the wife, upon the alleged grounds of his former treatment of her and of her fear of him, declined at that time to live with him. He, however, allowed her maintenance until about July, 1915.

County court proceedings ensued, the result of which was a declaration that the wife was entitled to one of the houses, which the appellant appeared to have purchased in his wife's name,

together with an account of all rents and profits in respect of that house.

These matters were completed about March or April, 1916.

On May 4, 1916, the wife's solicitors wrote to the husband's solicitors calling upon the husband either to make a home for his wife or to enter into an agreement to allow her a reasonable weekly sum for her maintenance.

The husband's solicitors, after seeing him upon that letter, wrote to the wife's solicitors the letter dated May 12, 1916, in the course of which they said : " It is not open to a wife to blow cold and blow hot in the way your client is attempting to do. She has, to put it shortly, made her own bed and she must lie on it. Any proceedings instituted will be defended." This was the letter referred to in the " reasons " stated by the justices.

J. Harvey Murphy, for the appellant. The order of the justices is bad on the face of it. It is founded upon, and purports to find the husband guilty of, an offence which has no existence in s. 4 of the Act. There was no finding of desertion, and therefore the directions as to non-cohabitation and payment of an allowance should be set aside, these being made upon a conviction for an offence which is not provided for in the Act.

H. du Parcq, for the respondent. There was a constructive causing to leave on the part of the appellant. If a wilful neglect to provide maintenance is shown, that is sufficient. Where one is dealing with desertion, there must be a breaking of an existing cohabitation ; but where it is a question of neglect to maintain, that existing cohabitation is not necessary. *Medway* v. *Medway* (1) is the nearest case in point.

[SHEARMAN J. In that case the wife did leave : she left because the husband showed her the door ; in fact he turned her out. In the present case the wife left no place as the result of her husband's neglect to maintain her.]

J. Harvey Murphy in reply.

SIR SAMUEL EVANS, PRESIDENT. The summons in this case alleged two offences within s. 4 of the Summary Jurisdiction

(1) [1900] P. 141.

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(Married Women) Act, 1895. In the first place, it alleged desertion, and, alternatively, wilful neglect to provide reasonable maintenance, which caused the wife to leave and live separately and apart from the husband. No objection was taken that these two offences were charged in one and the same summons.

The case comes before us on objection to the order made by the justices. They expressed no opinion on the question of desertion, but they adjudged that the husband had been guilty of wilful neglect to provide reasonable maintenance for his wife, and they went on to order that she was no longer bound to cohabit with him and that the husband was to pay a sum for his wife's maintenance.

The order does not say that the neglect to provide reasonable maintenance had caused the wife to leave and live separately and apart from her husband. There has been no judicial decision, as far as I can find, on the point whether there must be an actual physical leaving of the matrimonial home; and although there appear to have been expressions of opinion on the point in *Medway* v. *Medway* (1), they were dicta and nothing more.

In my opinion, it is quite clear that before a complainant can bring home to a defendant the offence in question within s. 4 of the Act, she must prove not only wilful neglect to provide reasonable maintenance for her, but also that this has caused her to leave and live separately and apart from him.

In my opinion, there has been no evidence in this case that if there has been a leaving it has been caused by wilful neglect to maintain the wife.

This order must be set aside. The justices have found the husband guilty of a matrimonial offence of which he has not been guilty and which does not exist within this Act of Parliament. What course, then, ought we to take?

There has been no adjudication upon the first part of the summons, which alleged desertion.

In the course which we propose to take, we express no opinion whether there has been desertion or not.

If the wife can prove before the justices that there has been desertion, it ought to be open to her to do so. Therefore, on that part of the summons, we remit the case to the Court of summary

(1) [1900] P. 141.

jurisdiction to be h eard by them as to the allegation of desertion upon the existing summons.

SHEARMAN J. I agree, and I only desire to add a few words on the construction of the section which gives Courts of summary jurisdiction power to make orders on various grounds. One of these grounds is where the husband has deserted the wife ; another is persistent cruelty ; then, if the husband has been guilty of wilful neglect to provide reasonable maintenance for his wife and shall by such neglect have caused her to leave and live separately and apart from him. This is a different thing from desertion, and, as far as I know, is entirely new ground and is not parallel to that in any other Court.

We have been asked to say that causing to leave merely means preventing the parties from living together ; but the statute obviously treats living separately and apart as something different from leaving. For a complainant to bring herself within this part of s. 4 of the Act, there must, in my opinion, be proved an actual physical departure from the particular place which constituted the matrimonial home of the parties.

Solicitors for appellant (husband) : *Neave, Morton & Co., for Churcher & Churcher, Gosport.*

Solicitors for respondent (wife) : *Tapp, Blackmore & Weston, for G. H. King & Frankeiss, Portsmouth.*

H. D. G.

1916
March 10.

ADMIRALTY.

THE KAFFIR PRINCE.

[1914, Fol. 509.]

Salvage—Freight added to Value of Salved Vessel.

The defendants' vessel was salved whilst on her way in ballast to the Tyne to earn freight under a charter. :—

Held, that, for the purpose of making an award, the amount of freight, which had been subsequently earned, should be taken into account in estimating the value of the property salved.

ACTION OF SALVAGE.

By their statement of claim, the plaintiffs, the owners, master, and crew of the Dutch steam trawler *Pieter Cornelis*—of 204 tons gross, and ten hands—claimed salvage remuneration for services, in the nature of towage, rendered to the defendants' steamship *Kaffir Prince* in the North Sea on December 7, 9, and 10, 1914. Her value was sworn at 10,500*l.*; but by amendment to the statement of claim the plaintiffs alleged that the salved vessel, the *Kaffir Prince*, was on a voyage from Hull to the Tyne in ballast "under a charterparty dated November 23, 1914, under which the *Kaffir Prince* then at Hull discharging was to proceed to the Tyne or Humber and there load a full and complete cargo not exceeding 2500 nor less than 2000 tons of coal on a voyage to Alexandria at a freight of 20*s.* per ton," and it was further alleged that "by reason of the services the *Kaffir Prince* was able to earn her freight under the aforesaid charterparty."

Dawson Miller, K.C., and *Balloch*, for the plaintiffs.

Laing, K.C., and *D. Stephens*, for the defendants.

The services of the plaintiffs' vessel were substantially admitted; but, in respect of the freight, the defendants contended that in the circumstances, for the purpose of making an award to the salvors, its value ought not to be added to the value of their vessel, as the charter was rather a clog than a benefit to the defendants, freights having risen.

In support of the plaintiffs' amendment to include the freight, in estimating the value of the defendants' vessel, the case of *Steamship Carisbrook Co.* v. *London and Provincial Marine and General Insurance Co.* (1) was referred to, in which the case of *The Progress* (2) is cited.

THE PRESIDENT (SIR SAMUEL EVANS),—who was assisted by two of the Elder Brethren of the Trinity House—in giving judgment, held that the services of the plaintiffs were eminently useful, and well performed in bad weather to a vessel short of coal and somewhat damaged ; but, though it would be taken into account, it was doubtful whether there was at that time much risk from mines laid by the enemy (German) or from their submarines.

With regard to the plaintiffs' amendment of their claim by adding the amount (840*l.*) of the freight subsequently earned in estimating the value of the salved vessel, there was no reason why, in the circumstances of the case, this should not be done, though it would not very materially affect the amount of the total award, which would be 800*l.* and costs.

Solicitors for plaintiffs : *Botterell & Roche.*
Solicitors for defendants : *Thomas Cooper & Co.*

(1) [1902] 2 K. B. 681. (2) (1810) Edw. 210, 218, 224.

L. L. M.

1916
Nov. 28, 29, 30.

FARULLI *v.* FARULLI AND PEDERZOLI.

Divorce Practice—Evidence—Trial of Issues between Petitioner and Co-respondent—Statement to Petitioner of Alleged Confession by Respondent to a Witness—Issue as to Alleged Collusion between Petitioner and Respondent—Relevancy.

Upon the trial of issues as to a co-respondent's alleged adultery and as to a counter-charge of collusion put forward in the co-respondent's answer, the evidence of a witness, called by the petitioner to prove statements made to him by the witness detailing a confession alleged to have been made by the respondent, who had not appeared to the citation, was admitted as being relevant to the counter-charge of collusion to present a false case to the Court and to obtain a decree contrary to the justice of the case.

HUSBAND'S petition for dissolution of marriage, claiming damages against the co-respondent.

The wife entered no appearance, and the question as to whether she had committed adultery with the co-respondent was left for the subsequent decision of the learned judge.

The issues raised between the petitioner and co-respondent were first tried with a jury.

The co-respondent, in his answer, denied that he had committed adultery with the respondent and countercharged collusion between the petitioner and respondent to present a false case and to obtain a decree contrary to the justice of the case.

The petitioner, in reply, denied the alleged collusion.

The only matter calling for a report was as to the admissibility of evidence tendered on behalf of the petitioner in the course of the examination of a female witness, who said that she had conveyed to the petitioner a statement that his wife had made to the witness a confession of adultery with the co-respondent.

Eldridge (*A. Powell, K.C.*, with him), for the petitioner. The evidence is relevant and material, having regard to the co-respondent's plea of collusion, as to which the petitioner has been cross-examined. The petitioner ought to be allowed to show what material he acted upon in presenting his petition, and to rebut the

allegation that he was acting in collusion with his wife to present a false case to the Court.

Rawlinson, K.C., and *D. Cotes Preedy*, for the co-respondent. The details of a statement which the witness says she conveyed to the petitioner are inadmissible and cannot be evidence against the co-respondent.

SHEARMAN J. The witness may only be asked what she said to the petitioner; but, having regard to the plea of collusion, I do not think that I can exclude the details of the statement which she says she made to the petitioner and upon which he is said to have acted. The evidence goes to show that the petitioner was acting honestly and was not engaged in a conspiracy as is alleged.

The witness then gave the evidence, and, the petitioner's case having closed, the jury stopped the case in the course of evidence which was being adduced on behalf of the co-respondent and found that the co-respondent had not committed adultery.

SHEARMAN J. dismissed the co-respondent from the suit with costs, and, after hearing further evidence (without a jury) against the respondent, found that the alleged adultery was not established and accordingly dismissed the petition.

Solicitors for the petitioner: *Saville & Mannoch.*

Solicitors for the co-respondent: *Hutchinson, Sons & Gomm.*

NOTE.—In the course of the examination of the witness in question, the respondent, who had been brought to the Court on subpœna, was requested to stand up to be identified, but the learned judge, interposing, forbade it, saying that he was not the first judge who had protested against such a practice, although he was told it had been allowed by others. In his view such a course was not humane and it was not proper.

At the sitting of the Court on the following morning (December 1), the learned judge, referring to the incident, said: In the course of the case yesterday, counsel asked a lady to stand up in Court, and I forbade it. My reasons are these. It is a well-understood practice that a person in the witness-box can be confronted with a person in Court. That is quite right when the person in Court is willing to stand up and does so by

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FARULLI v. FARULLI AND PEDERZOLI.

consent. But I think it is an abuse of the use of a subpœna that a person—in this case a lady—should be brought to the Court for the sole purpose of being asked to stand up in Court. I think it is not right that a person should be subpœnaed merely for that purpose and not being willing.

I wish to cast no reflection upon counsel in this particular case, as I understand that the same course has been pursued before in some other cases, and without protest.

H. D. G.

1916
Dec. 1, 18.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

(IN PRIZE.)

THE UNITED STATES.

[R, No. 58.]

Prize Court—Passing of Property in Time of War—Goods sent by Parcels Post—Seizure under Reprisals Order in Council of March 11, 1915.

A number of parcel post packages were seized under the Reprisals Order in Council of March 11, 1915, from the parcels mail of a Danish steamship bound from Copenhagen to New York as being goods of enemy origin and also as enemy property. The goods, which were manufactured in Germany and left the factories after the date of the Reprisals Order, had been ordered, and payment made, by various firms in America before the date of the Order, and in some cases before the outbreak of war.

It was contended on behalf of these firms that the goods when seized were neutral goods as the property passed to the purchasers when the goods left the factories :—

Held, that in time of war goods shipped from an enemy country to a neutral country, or from a neutral to an enemy country, are regarded as enemy property, qua the rights of belligerent captors, until delivery, and that it makes no material difference that at the one end or the other there is a transit by land.

Held, therefore, that the packages must be regarded as enemy property as well as of enemy origin, and that they (or their proceeds if sold) must be detained until the conclusion of peace.

IN this case the Procurator-General, on behalf of the Crown, claimed an order under art. IV. of the Reprisals Order in Council of March 11, 1915 (1), for the detention and/or sale of 1724 parcels

(1) Art. IV. of the Reprisals Order in Council of March 11, 1915: "Every merchant vessel which sailed from a port other than a German port after March 1, 1915, having on board goods which are of enemy origin, or are enemy property may be required to

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of miscellaneous goods seized from the parcels mail of the Danish steamship *United States* on the grounds that they were of enemy origin and also enemy property.

The *United States* left Copenhagen bound for New York in December, 1915. She was diverted to Kirkwall, and the packages in question were seized on January 20, 1916.

There were a number of different claimants and similar issues were raised in every case. Taking the claim of the American Bead Company, Inc., as typical, the claimants alleged that the goods, which consisted of artificial stones and jewellery, were ordered from various manufacturers in Germany on various dates between April 4 and December 18, 1914, and a quantity of the goods, which had to be manufactured, were paid for in June, 1914. By the terms of purchase and the course of business between the parties the goods were at the risk of the claimants and became their property on despatch from the several factories. The claimants further alleged that the postal correspondence of neutrals and belligerents was not within the provisions of the Order in Council, but this contention was not raised at the hearing.

The arguments and the cases cited appear in the judgment.

Sir Frederick Smith, A.-G., Sir George Cave, S.-G., and *R. A. Wright*, for the Procurator-General.

Bateson, K.C., and *L. C. Thomas*, for the claimants, the American Bead Company, Inc.

L. C. Thomas, for the remaining claimants.

Cur. adv. vult.

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discharge such goods in a British or Allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court and dealt with in such manner as the Court may in the circumstances deem to be just.

"Provided that no proceeds of the sale of such goods shall be paid out of Court until the conclusion of peace except on the application of the proper officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this Order.

"Provided also that nothing herein shall prevent the release of neutral property of enemy origin on the application of the proper officer of the Crown."

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THE UNITED STATES.

1916. Dec. 18. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment :—The Crown claims an order for the detention or sale of certain goods seized on a voyage from Copenhagen to the United States on the double ground (*a*) that the goods were of enemy origin, and (*b*) that they were enemy property.

The application is made under art. IV. of the Reprisals Order in Council of March 11, 1915.

It is not disputed that the goods were of enemy origin. But the claimants contended that they were neutral property, on the ground that before seizure the property had passed from the respective vendors in Germany to the respective purchasers in America.

The goods were despatched by the parcel mail on the *United States*, a Danish vessel. They were goods of multifarious kinds, and not such as would be sent by mail in times of peace. It is well known in this Court that since the war the mails have been used for the clandestine transmission of contraband and other goods and merchandise from foreign countries to Germany, and of goods and merchandise of various kinds from Germany to foreign countries.

The goods in the present case comprised such things as metal chains and bags, glass beads, cotton goods, skins, gloves, and musical instruments. The descriptions appear in the manifest. Short particulars of the goods claimed are as follow :—

Claimants.	Number of separate parcels.	Invoice values in marks.
American Bead Company, Inc.	129	15,622
C. Bruno & Co., Inc.	106	5,201
R. C. E. Chambers	183	5,978
Dieckerhoff, Raffloer & Co.	1,136	35,288
Carl Fischer	15	2,108
W. C. Van Sant & Co.	130	20,620
H. Wolff & Co.	21	4,063
Tiffany & Co.	4	1,480

The goods had been ordered before the date of the Order in Council, and in some cases payment had been made before that date. The goods had to be manufactured. The contentions of the claimants were that the goods became their properties when they

left the various factories in Germany. They left the factories in every case after the Reprisals Order in Council was made.

The question for decision is whether they were "enemy property" for the purpose of that Order. Putting it in another form, had the goods in these circumstances lost their enemy character and acquired a neutral character before the seizure ?

The Reprisals Order in Council deals with maritime commerce between belligerents (and of necessary consequence with that commerce in relation to neutrals also) in a state of war.

As I have pointed out before, it does not add to the articles which are confiscable and subject to condemnation as maritime prize of war. In that respect it deals more tenderly and generously with neutral commerce than was done under the old and existing law of strict blockade. Under the latter, ships and cargoes were condemned out and out as prize on breach or attempted breach of blockade. Under the Order in Council the ships are released, and the cargoes or their proceeds, if sale is ordered, are only detained until the conclusion of peace.

But although there is this important distinction between the results of the working of the Order and of the strict application of the law of blockade, it is obvious that the Order deals with maritime commerce during war upon the analogy of the law of prize. Indeed, it is under the international law of prize that the Order, as one of reprisal, derives its validity.

It is essential, therefore, to see how the question of the passing of property was regarded by the international law of prize.

The passing of property shipped on the seas during war is regarded by international law from a wholly different standpoint from that adopted by that law or by the municipal law in time of peace. In the case of *The Southfield* (1) this subject has already been dealt with in this Court. I there cited passages from Mr. Justice Story's work, and from the judgments of Lord Stowell in *The Vrow Margaretha* (2) and of Lord Kingsdown in *The Baltica* (3), so that their repetition is not necessary.

Stating the rule quite shortly it is this : Where goods are sent by

(1) (1915) 1 Br. & Col. P. C. 332.
(2) (1799) 1 C. Rob. 336 ; 1 Eng. P. C. 149.
(3) (1857) 11 Moo. P. C. 141 ; 2 Eng. P. C. 628.

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sea, captors' rights cannot be defeated by a mere transfer of legal ownership, by documents, without actual delivery of the goods themselves; such rights cannot be defeated unless and until the actual possession of the goods, as well as the property in them, has been changed before the seizure.

Such transfers have been described as transfers in transitu. This does not mean transfers made only while the goods are on the seas, between the shipment and the delivery. I take some concrete cases. If goods of a contraband nature had been bought by the enemy in America before shipment at New York, in circumstances where the legal ownership would remain in a neutral vendor according to the law in time of peace, they could still be captured on the voyage to Germany to the enemy purchaser, on the ground that they would be his on delivery, on whatever vessel, neutral or otherwise, they might be carried. So if goods of any kind so bought were shipped on an enemy vessel, or on a British or Allied ship, they would be capturable. It would be no answer to say that the matter had been so arranged that by municipal law the property would not pass until the goods had safely reached the hands of the enemy. The goods would be regarded in such cases as enemy property.

So in regard to goods shipped from the enemy country; if purchased by neutrals during a state of war, the contract is held invalid, and the property is deemed to continue as it was at the time of shipment, until the actual delivery (see Story's Notes on the Principles and Practice of Prize Courts, Pratt's ed., p. 64).

Having regard to the doctrine of continuous voyage, it makes no material difference that at the one end or the other there is a transit by land. And just as goods from New York to Germany intended to be delivered to the enemy are regarded as "enemy property," so goods from Germany to New York are also regarded as "enemy property," qua the rights of the captors. The same principles must be applied whether the goods are being carried from east to west or from west to east. To hold otherwise would be to encourage colourable transactions set up for the purpose of misleading and defrauding captors (see *The Baltica* (1)).

Upon this analogy I hold that "enemy property" in the Order in Council was intended to mean, and does mean, property which

(1) 11 Moo. P. C. 141; 2 Eng. P. C. 628.

is to be regarded as of "enemy character" in time of war. This view seems to me to be in accordance with the proviso to art. IV. of the Order, which refers to goods which had become neutral property *before* the Order was promulgated. To hold otherwise would make all the provisions of the Order as to "enemy property" nugatory; because, in order to defeat them, all that would be necessary would be that an enemy and his sympathetic neutral should take such steps as would make all goods shipped to and from Germany in theory and on paper the property of the neutral, in the strictly legal sense, during the whole of the transit.

For the reasons given I decide that the goods were enemy property as well as of enemy origin; and I order their detention until the conclusion of peace, with liberty to the Crown to apply for an order for their sale and detention of the proceeds.

Leave to admit an appeal within two months in the case of the American Bead Company, on giving security in the sum of 200*l.* *Time for appealing in the other cases extended until after the hearing of that appeal.*

Solicitor for the Procurator-General: *Treasury Solicitor.*
Solicitors for claimants: *Hewitt, Woollacott & Chown.*

E. C. T.

1916
Dec. 4, 11, 21.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION
ADMIRALTY.

(In Prize.)

THE HYPATIA.

[1914, No. 127.]

Prize Court—Commercial Domicil—Goods of Partnership Firm in Neutral Country—Enemy Partners—No Partner resident in Neutral Country—Condemnation of Goods as Enemy Property.

After the outbreak of war with Germany certain goods belonging to a partnership firm at Buenos Aires, and shipped before the war on a British ship, were seized as prize. All the partners of the firm were Germans resident at Antwerp, who had been expelled from Belgium as enemy subjects shortly after the outbreak of war:—

Held, that, although a subject of a belligerent State can acquire a commercial domicil in a neutral State which will protect his goods captured at sea from condemnation, residence in the neutral State is an essential condition of such domicil; and that, as none of the enemy partners of the firm were resident in the Argentine Republic at the time of seizure, the goods must be regarded as enemy property and subject to condemnation.

Suit for Condemnation of Cargo as Prize.

The facts, which are fully set out in the judgment, shortly were that, under a bill of lading dated July 10, 1914, 100 bales of wool were shipped at Buenos Aires on the British steamship *Hypatia* for carriage to Hamburg. War having broken out with Germany while the *Hypatia* was in the course of her voyage, she was diverted to Liverpool, where the goods were seized as prize. They were claimed by the shippers, H. Fuhrmann & Co., on the ground that the property had not passed to the buyers, and that, as the goods of a firm with a commercial domicil in a neutral country, they had a neutral character. All the partners of the firm of H. Fuhrmann & Co. were Germans. None of them resided in Buenos Aires, the business being carried on there entirely by managers and clerks. The only active partner left Buenos Aires in 1910 and took up his residence in Antwerp, where the two other partners already resided. Shortly after the outbreak of war all three were expelled by the Belgian authorities as enemy subjects.

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Sir Frederick Smith, *A.-G.*, and *H. Stranger*, for the Procurator-General.

Dawson Miller, *K.C.*, and *Dumas*, for the claimants.

[In the course of the arguments, which sufficiently appear from the judgment, the following cases were cited : *The Indian Chief* (1), *The Eumaeus* (2), *The Palm Branch* (3), *The Clan Grant* (4), and *The Flamenco* and *The Orduna*. (5)]

Cur. adv. vult.

1916. Dec. 21. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment :—The subject-matter of this claim is a consignment of 100 bales of wool shipped from Buenos Aires to Hamburg upon a British vessel before the outbreak of war.

The wool was shipped under a bill of lading to the order of the shippers for delivery at Hamburg. The shippers were a partnership of " H. Fuhrmann & Co." of Buenos Aires. They had contracted to sell the wool to a German company, " the Spinnerei Cossmansdorf G.m.b.H." Payment was to be made by drafts on the Dresden Bank, of Dresden, on account of the purchasers. The transaction was to be carried through on behalf of the shippers by a firm of " Fuhrmann & Co.," of Antwerp.

The goods were seized at Liverpool on August 14, 1914. The writ was issued on September 5, 1914. Appearances were entered at first by Fuhrmann & Co., afterwards by H. Fuhrmann & Co., and lastly by the liquidators of H. Fuhrmann & Co. The claimants were H. Fuhrmann & Co. of Buenos Aires, the vendors and shippers. They claimed the goods as neutrals on the ground that the property had not passed from them to the German buyers.

After an investigation of the facts I find, upon the principles adopted in *The Miramichi* (6), that at the time of the capture the property in the goods was in H. Fuhrmann & Co. of Buenos Aires.

The remaining question is whether, according to the principles of international law, that firm is entitled to the release of the goods.

The dramatis personae are four persons. Between them they constituted at all material times three firms, one in Antwerp,

(1) (1800) 3 C. Rob. 12 ; 1 Eng. P. C. 251.
(2) (1915) 1 Br. & Col. P. C. 605.
(3) [1916] P. 230.
(4) (1915) 1 Br. & Col. P. C. 272.
(5) (1915) 1 Br. & Col. P. C. 509.
(6) [1915] P. 71.

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another in Buenos Aires, and the third in Berlin. The four persons are Peter Fuhrmann, Laura Fuhrmann (widow of Johann Daniel Fuhrmann, deceased), Heinrich Fuhrmann, and Richard Fuhrmann. The Antwerp firm was called "Fuhrmann & Co." It consisted of Peter, Heinrich, and Richard (the active partners), and Laura (a sleeping partner).

The Buenos Aires firm was called "H. Fuhrmann & Co." It consisted of Heinrich (the active partner) and Peter and Laura (sleeping partners), all three being German subjects.

The Berlin firm was called "Richard Fuhrmann & Co." It consisted of Richard (the active partner) and Peter and Laura (sleeping partners).

The claimants (the Buenos Aires firm) contended that they had a neutral domicil, either Argentine or Belgian. As members of the firm at Buenos Aires they claimed a commercial domicil, and as residents in or about Antwerp they claimed an acquired domicil in Belgium. As to the latter claim, I find that it is clear from the evidence that they never acquired a Belgian domicil, and never abandoned their German nationality. It is possible that they would be entitled to be regarded as having a commercial domicil in Belgium qua their Antwerp house of trade, while they resided there; but the transaction in question was not the business of that house, and the Antwerp firm made no claim to the goods.

Not one of the partners of the firm of H. Fuhrmann & Co. resided at Buenos Aires, or in any part of the Argentine Republic. At the beginning of the war they were all expelled from Belgium as subjects of Germany and as enemies of Belgium. It was admitted by counsel for the claimants that probably Heinrich and Laura were expelled before the seizure of the goods. Peter may have been arrested and expelled later. I do not think, however, that matters.

Heinrich shortly after his expulsion was in Düsseldorf. He was in bad health, and died in Germany in July, 1915. He never ceased to be a German subject.

Laura Fuhrmann was the mother of Heinrich. She accompanied him to Germany. She was also a sleeping partner in Richard Fuhrmann & Co. of Berlin. She swore her affidavit in support of the claim in Germany. She has never ceased to be a German subject.

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Peter served with the Prussian army in the Franco-Prussian war. While he was in Antwerp he was one of the heads of the German colony there, and has contributed to the German war loan. He was also arrested, imprisoned, and afterwards expelled by the Belgian authorities, and he subsequently returned to Antwerp after the occupation by the Germans. He is also a sleeping partner in Richard Fuhrmann & Co. of Berlin, and has never ceased to be a German subject.

The three partners in the claimants' firm being Germans, the question arises whether they in fact or in law acquired a commercial domicil in the Argentine Republic.

It is well known that according to the English and American views of international law (although not according to the French or German or general European view) a subject of a belligerent State can have a commercial domicil in a neutral State, which would protect his property from capture at sea. But I think that residence in the neutral State is an essential condition of such a domicil.

I know of no case where, merely by reason of carrying on business through agents or clerks in a neutral State, subjects of an enemy can acquire a commercial domicil without residence in that State.

In his celebrated judgment in *The Indian Chief* (1) Lord Stowell said of Mr. Johnson, the American consul: "He came to this country in 1783, and engaged in trade, and has *resided* in this country till 1797; during that time he was undoubtedly to be considered as an English trader; for no position is more established than this, that if a person goes into another country, and engages in trade, and *resides* there, he is, by the law of nations, to be considered as a merchant of that country."

In the case of *The Venus* (2), where the Supreme Court of the United States discussed questions of commercial domicil so fully, it will be seen that throughout the judgments residence was regarded as an essential ingredient. On this question Chancellor Kent says: "If [a person] *resides* in a belligerent country, his property is liable to capture as enemy's property, and if he *resides* in a neutral country, he enjoys all the privileges, and is subject to all the inconveniences,

(1) 3 C. Rob. 12, 18; 1 Eng. P. C. 251, 252.
(2) (1814) 8 Cranch, 253.

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of the neutral trade" (Kent's Commentaries, 14th ed., vol. 1, p. 103).

Mr. Dicey also in his Conflict of Laws deals with the matter thus: "A commercial domicil . . . . is such a *residence* in a country for the purpose of trading there as makes the person's trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country. When a person's civil domicil is in question, the matter to be determined is whether he has or has not so settled in a given country as to have made it his home. When a person's commercial domicil is in question, the matter to be determined is whether he is or is not *residing* in a given country with the intention of continuing to trade there" (Dicey's Conflict of Laws, 2nd ed., 1908, p. 742).

It is sometimes said that Lord Stowell in *The Jonge Klassina* (1) expressed the opinion that a man may acquire a commercial domicil in more countries than one. The passage referred to is as follows: "A man may have mercantile concerns in two countries, and if he acts as a merchant of both, he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries. That he has no fixed compting-house in the enemy's country will not be decisive. How much of the great mercantile concerns of this kingdom is carried on in coffee-houses? A very considerable portion of the great insurance business is so conducted. It is indeed a vain idea, that a compting-house or fixed establishment is necessary to make a man a merchant of any place. If he is there himself, and acts as a merchant of that place, it is sufficient; and the mere want of a fixed compting-house there, will make no breach in the mercantile character which may well exist without it."

That case was one involving the question of carrying on a trade outside and beyond that authorized by a particular licence to trade. It is no decision that the existence of a fixed compting-house or house of trade in a neutral country without residence by a trader or partner in that country will endow him with a neutral commercial domicil which will give him, though an enemy subject, protection

(1) (1804) 5 C. Rob. 297, 302; 1 Eng. P. C. 485, 488.

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for his goods from maritime seizure. Indeed the passage itself seems to assume the presence of the trader in the neutral country.

I note that in dealing with this case the late Mr. Westlake said: "Without having or being a partner in a house of business established in a given country, a man may in that country make contracts or do other acts of a trader, not linked together otherwise than through his person. Then we have the state of facts with regard to which Lord Stowell said that 'a man may have mercantile concerns in two countries, and if he acts as a merchant of both he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries'" (Westlake's International Law, part II., p. 164).

It must not be taken that I am expressing any opinion as to whether a man can have a commercial domicil in two neutral countries which would entitle him to be regarded as a neutral trader in both. I can conceive that it is possible that he might establish a sufficient residence in both for the purpose. Nor am I considering the case of a corporation or incorporated company which might theoretically have a "residence" in the country where it was registered. Dealing with the case now before the Court, in my view a commercial domicil such as is here claimed cannot be established without proof of a sufficient residence of the partners or some of them in the country where the business is carried on, or where the house of trade is situate.

A further argument remains to be dealt with. It was contended that the partners in the firm were Belgians and resident in Belgium. I have already expressed the opinion that they had not become Belgians, but that they remained German subjects. But the argument was that residence in one neutral country was enough to constitute a commercial domicil in another country in respect of transactions originated in the latter. I cannot think that can be so. But, in any event, the facts in this case show that there was no residence by any of the Buenos Aires partners in Antwerp at the time of the capture. It is clearly established in the law of nations that claimants must prove their non-hostile character at the time of capture. I have also decided in other cases that they must prove this at the time of the claim, and of the adjudication.

What, then, was the character of the claimant partners when the

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goods were captured ? Two of them, if not the three, had before then been expelled from Antwerp and Belgium and had gone back to Germany. Their residence in Belgium had therefore been terminated. Indeed, as they were German subjects, it came to an end when Germany made war on Belgium. The position of such persons is aptly described by Marshall C.J. in *The Venus* (1) in the following passage : " The right of the citizens or subjects of one country to remain in another, depends on the will of the sovereign of that other ; and if that will be not expressed otherwise than by that general hospitality which receives and affords security to strangers, it is supposed to terminate with the relations of peace between the two countries. When war breaks out, the subjects of one belligerent in the country of the other are considered as enemies, and have no right to remain there."

Moreover, the proper inference to draw from the facts in my view is that the claimants adhered at once to their country—the enemy—upon the outbreak of war. If the three Fuhrmanns had no right to remain in Antwerp after their country made war on Belgium—whether they were expelled before the capture or not—it is not possible that they could set up a residence, to which they had no right, as a ground for protection against capture at sea of any goods the subject-matter of transactions of their Belgian or Argentine or any other of their businesses.

The claim of H. Fuhrmann & Co. is disallowed.

I find that the wool at the time of capture was enemy property on a British ship ; and accordingly I adjudge its condemnation as prize to the Crown as droits of admiralty.

Liberty to admit an appeal within three months ; security 350*l.*

Solicitor for the Procurator-General : *Treasury Solicitor.*
Solicitors for claimants : *Pritchard & Sons.*

(1) 8 Cranch, 253, 290.

E. C. T.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.
ADMIRALTY.

1916
Dec. 12, 18.

(In Prize.)

THE FREDERIK VIII.

[R, No. 95.]

Prize Court—"Goods" or "Commodities"—German Government Bonds—Seizure from Letter Mail—Reprisals Order in Council of March 11, 1915.

German Government bonds, which had been sent from a German banking company in Berlin to a firm in Copenhagen to be forwarded by registered post to a bank in Chicago, were seized, as goods or commodities of enemy origin, under the Reprisals Order in Council of March 11, 1915, from the letter mail of the Danish steamship which was carrying them from Copenhagen to the United States :—

Held, that the bonds were "goods" or "commodities" within the meaning of those words in the Order, and, being of enemy origin, that they were subject to detention until the conclusion of peace, to be then dealt with as the Court might order.

In this case the Procurator-General, on behalf of the Crown, claimed the detention and/or sale of thirty German Government bonds under the Reprisals Order in Council of March 11, 1915.

The bonds, which were for 1000 marks each, were sent by registered letter by the firm of Beckmann & Jorgensen, of Copenhagen, addressed to the State Commercial and Savings Bank, Chicago, and were seized at Kirkwall on May 11, 1916, from the letter mail of the Danish steamship *Frederik VIII.*, which was diverted to Kirkwall in the course of her voyage from Copenhagen to United States ports.

From an affidavit which had been sworn by the vice-president of the State Commercial and Savings Bank, it appeared that on February 25, 1916, the bank remitted 30,000 marks by cable to the Direktion der Disconto Gesellschaft, Berlin, for the purchase of German Government bonds, and that on March 14 the Disconto Gesellschaft sent the bonds in question to Beckmann & Jorgensen to be forwarded to the State Commercial and Savings Bank at Chicago.

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The writ, which was issued on June 15, 1916, claimed "an order for the detention and/or the sale of the goods and commodities . . . . as being of enemy origin and/or enemy property or otherwise . . . . "

Under art. IV. of the Reprisals Order in Council of March 11, 1915, which (according to the preamble) was promulgated "to restrict further the commerce of Germany" and (according to the recital) "to prevent commodities of any kind from reaching or leaving Germany," it is provided that "Every merchant vessel which sailed from a port other than a German port after March 1, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or Allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court and dealt with in such manner as the Court may, in the circumstances, deem to be just . . . . "

No appearance or claim was entered.

Sir Frederick Smith, A.-G., and *R. A. Wright*, for the Procurator-General, in support of the contention that the bonds were "goods" or "commodities" within the meaning of the Order, cited *Embiricos* v. *Anglo-Austrian Bank* (1); Story's Notes on the Principles and Practice of Prize Courts (Pratt's ed.), p. 28; the Proclamation of April 14, 1916 (referred to in the judgment); and art. 53 of the Fourth Hague Convention, 1907, concerning the Laws and Customs of War on Land.

Cur. adv. vult.

Dec. 18. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—The question of law in this case is whether bonds of the German Government are comprised in the words "goods" or "commodities" within the meaning and operation of the Reprisals Order in Council of March 11, 1915.

German Government bonds of the nominal value of 30,000 marks were sent by the Direktion der Disconto Gesellschaft, of Berlin, to

(1) [1905] 1 K. B. 677.

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the firm of Messrs. Beckmann & Jorgensen, of Copenhagen, for transmission to the State Commercial and Savings Bank of Chicago. They were shipped on the steamship *Frederik VIII.* on March 30, 1916. A few days afterwards they were required to be discharged under the said Reprisals Order.

The present application by the Crown is for an order for their detention as goods of enemy origin and/or enemy property. No claimant has appeared. But an affidavit was made on behalf of the American bank and submitted to the Procurator-General.

No order for their detention can be made unless the bonds come within the description "commodities" or "goods." The Order deals with matters analogous to maritime prize, although it refrains from subjecting the goods to confiscation.

In prize the bonds and their accompanying coupons would be goods subject to seizure and confiscation as realizable securities, negotiable instruments, or choses in action, if they were enemy property on an enemy, British, or allied vessel. Story says that the ordinary prize jurisdiction of the Admiralty extends to all captures made on the sea "whether the property so captured be goods, ships, or mere choses in action" (see Story's Notes on the Principles and Practice of Prize Courts (Pratt's ed.), p. 28). It may be observed that for the purposes of the Naval Prize Act, 1864, the term "goods" includes "all such things as are by the course of admiralty and law of nations the subject of adjudication as prize" (s. 2).

Prima facie, if bonds were "goods" capturable as prize, one would expect them also to be included within a reprisals Order. Various interpretations have been given to the word in cases relating to wills, contracts, and legal documents of many kinds, and to Acts of Parliament dealing with various subjects. But it would serve no good purpose to cite or discuss such cases. The question is whether the securities are "goods" or "commodities" under the Order referred to.

The reasons for the Order, due to the enemy's method of maritime warfare and their recitals, are well known. The object is stated to be the further restriction of the commerce of Germany, and it is stated in a recital as follows: "And whereas His Majesty has therefore decided to adopt further measures in order to prevent commodities of any kind from reaching or leaving Germany, though

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such measures will be enforced without risk to neutral ships, or to neutral or non-combatant life, and in strict observance of the dictates of humanity."

The word "commodity" is one of extensive meaning, denoting anything that is useful, convenient, or serviceable. And it would not be easy to conceive a wider or more comprehensive phrase than "commodities of any kind." It is a phrase more used in common speech than in legal terminology; so it is not surprising that in the operative part of the Order the legal words "goods" and "property" are used simply, without the collocation of any such words as chattels, wares, or merchandise.

I think it abundantly clear that the bonds in question come within those words. If money, notes, or cheques were shipped from America to Germany for the purchase of these bonds, they would clearly be goods or property with an enemy destination, and equally so are the bonds sent in return goods or property of enemy origin. It may also be mentioned that in the Proclamation of April 14, 1916, "gold, silver, paper money, and all negotiable instruments and realizable securities" are treated as articles of absolute contraband capturable and confiscable as prize.

There being no claimant before the Court, I give no decision upon the question whether the bonds were enemy property. But as goods of enemy origin I order their detention until the conclusion of peace, to be then dealt with as the Court may order.

Solicitor for the Procurator-General: *Treasury Solicitor.*

E. C. T.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(In Prize.)

1916
Dec. 18, 21.

In the Matter of THE BATTLE OF THE FALKLAND ISLANDS.

Ex parte H.M.S. CANOPUS.

[1916, No. 1162.]

Prize Court—Prize Bounty—Destruction of Enemy Warships—Squadron Action—Vessels "actually present"—Naval Prize Act, 1864 (27 & 28 *Vict. c.* 25), *s.* 42—*Order in Council of March* 2, 1915.

By Order in Council of March 2, 1915, His Majesty, in accordance with the provisions of s. 42 of the Naval Prize Act, 1864, declared his intention to grant as prize bounty for distribution among such of the officers and crews of any of his ships of war as were actually present at the taking or destroying of any armed ship of any of His Majesty's enemies a sum calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement.

On December 7, 1914, a British squadron of warships, which were searching for a squadron of German warships, arrived at Port Stanley in the Falkland Islands. A council of war was held on board the flagship, and it was decided that H.M.S. *Canopus*, which had been lying at Port Stanley for some weeks, should remain there for the defence of the port. The *Canopus* was firmly embedded in the mud, where she had been grounded in a position to obtain an all-round fire to seaward, and her double bottoms had been flooded to keep her steady. On the approach of two enemy cruisers the next morning, being in a position to fire over the land, she fired two salvoes with her 12-inch guns at a range of 11,000 yards, and there was evidence that a ricochet from the second salvo hit the base of the after funnel of one of the cruisers and killed five men. The enemy vessels then steamed away to rejoin their squadron, and the British squadron, with the exception of the *Canopus*, proceeded out of harbour. A general chase ensued, and late in the afternoon, after a running fight, the enemy squadron was brought to action and four of the enemy ships were sunk, the main action taking place over 100 miles away from Port Stanley.

On a motion on behalf of the officers and crew of H.M.S. *Canopus* to share in the sum of 12,160*l.* previously awarded as prize bounty to the British squadron in respect of the destruction of the enemy ships :—

Held, that the *Canopus* did not form a part of the squadron or take part in the engagement, and that the officers and crew were

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not entitled to share in the bounty as being actually present at the destruction of any of the enemy ships within the meaning of s. 42 of the Naval Prize Act.

MOTION FOR PRIZE BOUNTY.

In this motion the commander, officers, and crew of H.M.S. *Canopus* claimed a declaration that they were entitled to share in the sum of 12,160*l.* awarded by the learned President on August 21, 1916, as prize bounty to the officers and crews of Vice-Admiral Sturdee's squadron, consisting of His Majesty's ships *Invincible*, *Inflexible*, *Cornwall*, *Carnarvon*, *Glasgow*, and *Kent*, in respect of the destruction of four German warships on December 8, 1914, in the action off the Falkland Islands.

The facts, which were set out in an affidavit of Rear-Admiral Grant, at the material time captain of H.M.S. *Canopus*, are summarized in the head-note and are fully stated in the judgment. From this affidavit it appeared that the first intimation the applicants had of the prize bounty proceedings was the report of the distribution of the bounty on August 21. Rear-Admiral Grant was quite unaware of the report of Vice-Admiral Sturdee upon which the proceedings were taken, and did not know that the officers and crew of the *Canopus* would not be included therein as persons entitled to participate.

C. R. Dunlop, in support of the motion. The *Canopus* formed part of a united force acting for a general purpose. In such a case the rule is that it is "a conflict of all with all," and the connection is not broken by elongation of distance or by being detached on a distinct service: *The Ville de Varsovie.* (1) The general engagement began when the *Canopus* fired the first shots, killing five men on the *Gneisenau*. The part the *Canopus* was to take in the common enterprise was arranged at the war council held on board the flagship. If the *Canopus* had not been there another ship would have had to be detached from the squadron for the defence of the port, and the squadron would thereby have been weakened. She rendered real assistance in opening fire over the land and thus frustrating the attempt of the enemy's cruisers to ascertain and communicate the

(1) (1818) 2 Dods. 301, 304, 319; 2 Eng. P. C. 220, 221, 225.

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strength of the British squadron to the other vessels of the enemy fleet.

Commander Maxwell Anderson, R.N., for the officers and crews of Vice-Admiral Sturdee's squadron, contra. The *Canopus* is not entitled to share in the prize bounty. She has not proved that the action which resulted in the destruction of the enemy ships was the joint product of the co-operation of herself with the other vessels and the object for which the vessels were united: *The Nordstern.* (1) Mere common enterprise is not sufficient even in the case of prize capture: *The Vryheid* (2); and prize bounty, which is "the reward for real and active service," is restricted within much narrower limits than prize capture: *The Ville de Varsovie.* (3) The *Canopus* had turned herself into a fort—a portion of the land forces—and could not have rendered any assistance in the action, which was fought 100 miles away, if required to do so, for she was slower than any of the other vessels and could not have come up in time: cf. *La Melanie.* (4) [*L'Alerte* (5) was also referred to.]

C. R. Dunlop replied.

Clive Lawrence, for the Procurator-General, took no part in the arguments.

Cur. adv. vult.

Dec. 21. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—This is an application by the commander, officers, and ship's company of H.M.S. *Canopus* claiming to share the prize bounty of 12,160*l.* which I awarded in August last to the squadron of Vice-Admiral Sir Frederick Sturdee, in respect of the destruction of the German warships *Scharnhorst, Gneisenau, Leipzig*, and *Nürnberg* in the naval battle off the Falkland Islands in December, 1914.

The enactment now in force regulating the grant of prize bounty is s. 42 of the Naval Prize Act, 1864. The section is as follows: "If, in relation to any war, Her Majesty is pleased to declare by Proclamation or Order in Council her intention to grant prize bounty to the officers and crews of her ships of war, then such of the officers and crew of any of Her Majesty's ships of war as are actually present

(1) (1809) 1 Acton, 128.
(2) (1799) 2 C. Rob. 16; 1 Eng. P. C. 179.
(3) 2 Dods. 301, 308; 1 Eng. P. C. 220, 221.
(4) (1816) 2 Dods. 122.
(5) (1806) 6 C. Rob. 238.

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at the taking or destroying of any armed ship of any of Her Majesty's enemies shall be entitled to have distributed among them as prize bounty a sum calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement."

The test to be applied to the present claim is, accordingly, whether the commander, officers, and crew of H.M.S. *Canopus* were actually present at the destruction of the aforesaid four German warships.

It is well to advert to the nature of prize bounty, or head-money as it was called in former times. It had no necessary connection with the capture or joint capture of prize of war. It is "the peculiar and appropriate reward of immediate personal exertion," and was originally "to be paid only to the actual captor": *La Gloire.* (1) It was established "expressly for the purpose of exciting personal enterprise, and of counterbalancing present danger, by peculiar and appropriate rewards": see note of Christopher Robinson to case of *L'Alerte.* (2)

In order to determine whether the officers and crew of the *Canopus* can be considered to have been actually present at the destruction it is necessary to examine the facts closely.

The naval battle of the Falkland Islands took place in the afternoon of December 8, 1914. The facts are set out in Vice-Admiral Sturdee's despatch of December 19, 1914. He does not include the *Canopus* among his squadron, which arrived at Port Stanley, Falkland Islands, on the morning of December 7, 1914, ready to resume a search for the enemy's squadron on the next day. The *Canopus* had been at the port since November 12, 1914. She had been ordered there by the Admiralty to arrange the defence of the port against attack by the enemy. The work of defending the harbour and possible landing places in the vicinity was at once commenced under the direction of the commander, Captain (now Rear-Admiral) Heathcoat Grant. It comprised the landing of the ten 12-pounder guns from the *Canopus*, the construction of shore batteries, and of mines at the entrance, the erection of look-out stations, the establishment of an examination service of vessels entering or leaving the harbour, and the censoring of correspondence. Ultimately the *Canopus* was grounded in a position to obtain an all-round fire to seaward, and to protect the harbour and town of

(1) Edw. 280. (2) 6 C. Rob. 238.

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Stanley from bombardment from seaward. Her double bottoms were flooded to keep her steady, and she was secured with anchors out ahead and astern. For some time before the squadron arrived she was firmly embedded in the bottom.

Captain Grant had no information as to the concentration of Vice-Admiral Sturdee's squadron before its arrival on the morning of December 7. After his arrival Vice-Admiral Sturdee expressed himself satisfied with the arrangements which had been made for the defence of the port, and appointed Captain Grant as senior officer of the Falklands, in charge of the defences, berthing of auxiliaries, and provisioning of the squadron.

During the afternoon of December 7 a meeting of the commanding officers of the vessels of the squadron was held aboard the flagship, at which the commander of the *Canopus* was present. In the words of the latter, "The decision arrived at included the *Canopus* remaining at Port Stanley in order to defend the same during the absence of the fleet."

On the next morning some enemy ships were sighted and duly reported from the signal station to the flagship of the squadron. At 9.20 A.M. the armoured cruisers *Gneisenau* and *Nürnberg* came within range of the *Canopus*, with guns trained on the wireless station inland. The *Canopus* opened fire at them across the lowland at a range of 11,000 yards. Two salvoes were fired. The two cruisers at once hoisted their colours and steamed away. A ricochet from the second salvo was thought to have hit, and probably did hit, the *Gneisenau*. At 9.45 A.M. the squadron, which had been lying in harbour, weighed and proceeded out to sea. At 10.20 the signal for a general chase was made. At 12.47 the signal to "open fire and engage the enemy" was given. The range was from 15,000 to 16,500 yards.

Details of the action are described in Vice-Admiral Sturdee's despatch. It is enough here to say that in the main action the *Scharnhorst* was sunk at 4.17 P.M.; the *Gneisenau* turned on her beam ends and sank at 6 o'clock; and in the action with the light cruisers the *Nürnberg* sank at 7.27 and the *Leipzig* turned over and disappeared at 9 o'clock that night. Vice-Admiral Sturdee returned to Port Stanley on December 11. It is gratifying to mention that he expressed his thanks to Rear-Admiral Grant for the work done

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by the *Canopus*, and also expressed his appreciation to the ship's company later.

The *Canopus* did not, and could not, join in the chase. Her speed was much less than the slowest of the squadron. If she had been ordered to do so, she could not have put out to sea from the position where she was fixed till about 4 o'clock in the afternoon. Meanwhile the naval action was at its height over 100 miles away, and the first armoured cruiser was being destroyed about that time; while the *Canopus* remained at her post of duty near the harbour.

Upon these facts Rear-Admiral Grant, on behalf of his ship's officers and crew, claimed to participate in the prize bounty on the grounds:

(*a*) That H.M.S. *Canopus* had made Port Stanley a defended port, and held it until the arrival of the squadron.

(*b*) That by her gunfire she drove off the *Gneisenau* and *Nürnberg*, and prevented them from making a reconnaissance of the superior strength of the British squadron in the port.

(*c*) That the defence of the port allowed of the safe coaling and revictualling of the squadron on December 7 and 8.

(*d*) That the look-out stations and communications established by the *Canopus* were the means of giving the squadron sufficient warning to raise steam, cast off colliers, and leave in pursuit to catch the enemy.

(*e*) That probably the ricochet shot from the *Canopus* struck the base of the after funnel of the *Gneisenau* and killed five of her men.

I believe that Rear-Admiral Grant was actuated by motives of the best kind towards his officers and men in making this application to the Court that his ship should share in the prize bounty. It is only right also that this Court should testify, and testify gratefully, to the good work done by the rear-admiral and his ship from November 12 up to and including December 8. They know that they have the gratitude of their country, and must feel the satisfaction themselves which comes from the sense of a good and faithful performance of serious duties.

But on an application of this kind this Court has also its duty to carry out in accordance with the law which prescribes it.

I am not left without the guidance of precedents well established long ago. There is no real difference as to prize bounty between the

provisions of the Naval Prize Act of 1864 and the former Act of 1805, which enacted that it should be paid to persons "who shall have been actually on board any of His Majesty's ships at the actual taking, sinking, burning, or otherwise destroying of any enemy ship of war." Such cases as *L'Hercule* (1) (decided by the Lords of Appeal in Prize in 1799), *L'Alerte* (2) (decided by Lord Stowell in 1806), *La Gloire* (3) in 1810, and *La Melanie* (4) state the principles on which this Court should act, and illustrate their application.

In my opinion the *Canopus* did not form a part of the squadron and did not in any sense join in the chase or take part in the naval engagement; she was detached for other duties outside the engagement; and her commander, officers, and crew were not actually present at the destruction of the four enemy ships in any sense within the meaning or intent of the enactment referred to. Accordingly my decision must be that they are not entitled to share in the distribution of the prize bounty allotted, and the application is dismissed. (5)

Solicitors for applicants: *Daniell & Glover, for Barton Mackrell & Co., Navy Agents.*

Solicitors for respondents: *Arthur Tyler, for Stilwell & Sons, Navy Agents (H.M.S. Invincible, Inflexible, Cornwall, and Carnarvon); Wilde, Moore & Co., for the National Provincial Bank of England, Navy Agents (H.M.S. Kent); Charles Stevens & Drayton, for Martin's Bank, Limited, Navy Agents (H.M.S. Glasgow).*

Solicitor for the Procurator-General: *Treasury Solicitor.*

(1) Cited in *L'Alerte*, 6 C. Rob. 241.

(2) 6 C. Rob. 238.

(3) Edw. 280.

(4) 2 Dods. 122.

(5) NOTE. — On January 11, 1917, an application was made on behalf of the successful respondents for costs. The PRESIDENT, in dismissing the application, said that at the hearing he had expressed the view that the motion was properly brought; it raised a new point so far as the present war was concerned; and he believed Rear-Admiral Grant had instituted the proceedings quite as much for his ship's company as for himself.

E. C. T.

1916
Dec. 18.

In the Estate of JOHN WARDROP, Deceased.

Soldier's Will—Marriage—Revocation.

The will of a soldier on actual military service, whether the same be executed according to the provisions of s. 9 or s. 11 of the Wills Act, 1837 (1 Vict. c. 26), or not, falls within the general provision contained in s. 18 and is revoked by the testator's subsequent marriage.

This was a motion for proof of a nuncupative will, and for letters of administration with the contents or effect thereof to be granted to the sole beneficiary, the testator's widow.

The testator was a lieutenant in the 8th battalion of the Royal Fusiliers and was killed in action in France on August 3, 1916.

On September 7, 1914, when about to join his regiment in France, he made a will in writing, which was duly executed in accordance with s. 9 of the Wills Act, leaving all his property to the lady he was then engaged to, and appointing her sole executrix.

On May 4, 1916, while on leave in England, he married that lady, and in the same month he rejoined his regiment in France.

On several occasions he informed Lieutenant Royle, a brother officer in his battalion, that, in the event of his being killed, he wished his money and all his other property to go to his widow. The last occasion when the deceased mentioned this to Lieutenant Royle was on August 2, 1916, the day before his death; and Lieutenant Royle deposed to these facts.

The estate consisted of 1336*l.* 6*s.* 1*d.* Consols, 750*l.* London County 3 per cent. Consolidated Stock, and cash and personal effects 61*l.* 13*s.* 4*d.*

There was no real estate.

The only next of kin were three sisters, who had consented that the case should be dealt with on motion.

Priestley, K.C., and *J. H. Watts*, on behalf of the widow, raised the question whether the will of September 7, 1914, was revoked by the testator's subsequent marriage; but, if it were so held, they asked for a grant of letters of administration with the nuncupative will annexed, as deposed to by Lieutenant Royle.

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WARDROP, IN THE ESTATE OF.

SHEARMAN J. In this case John Wardrop, a lieutenant in the Royal Fusiliers, was killed in action in France on August 3, 1916.

On September 7, 1914, he made a will leaving all his property to the lady to whom he was then engaged and whom he subsequently married. That will was prepared by a solicitor and executed in the ordinary way.

In May, 1916, he was on leave and married the lady; and he afterwards returned to France and was killed.

There is the clearest possible evidence that on the day before his death he spoke to a comrade, Lieutenant Royle, saying that he wished all his property to go to his wife.

It was pointed out in the course of the argument that before the Wills Act marriage did not revoke a will, and, consequently, that the Court might hold that a will made by a soldier while on active service or by a sailor at sea would not be revoked by marriage.

I do not think there is any real difficulty about the matter.

The Wills Act, by s. 9, provides that every will shall be in writing and shall be executed and attested with certain formalities; but s. 11 expressly reserves to every soldier in actual military service and to every sailor at sea the right to dispose of their personal property in the same manner as they might have done before the Act was passed—that is, even by word of mouth only.

But in a subsequent section of the Act (s. 18) (1) we find that every will shall be revoked by subsequent marriage of the testator. That is a very sweeping enactment, and it must be held to apply to soldiers' and sailors' wills, especially as we find one exception, and one only, specifically mentioned, namely, wills made under any power of appointment.

In the present case, the written will was revoked by the subsequent marriage; but the later will, made by word of mouth on the day

(1) The Wills Act (1 Vict. c. 26), s. 18, is as follows: "And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions)."

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WARDROP, IN THE ESTATE OF.

Shearman J.

before the testator was killed, as deposed to by Lieutenant Royle, is established to my satisfaction, and I pronounce for it accordingly.

I grant letters of administration to the widow with that will annexed, as contained in Lieutenant Royle's affidavit.

Solicitors: *Rollit, Sons, & Compston.*

H. D. G.

1917

Jan. 26.

HOOK *v.* HOOK AND BROWN (THE KING'S PROCTOR SHOWING CAUSE).

Divorce—Adultery of Petitioner (Husband) undisclosed—Ignorance of Law and Practice—Poor Person—Discretion exercised on King's Proctor's Intervention.

In exercising the discretion conferred upon the Court by s. 31 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), each case must be considered in the light of its own circumstances and surroundings.

Where a petitioner who had lived apart from his wife did not know and was not told that his own adultery, committed long after his wife left him, was a material fact which he ought to disclose at or before the hearing of his petition, the Court refused to rescind the decree nisi, but ordered the petitioner to pay the costs of the King's Proctor.

ON May 17, 1916, the King's Proctor filed his plea, alleging that material facts had not been brought to the knowledge of the Court; that during the marriage the petitioner frequently committed adultery with May Gwendoline Predith; and that on May 19, 1915 (at an address named), the said May Gwendoline Predith gave birth to an illegitimate male child of which the petitioner was the father.

The King's Proctor on these grounds prayed the Court to rescind the decree nisi pronounced by Bargrave Deane J. on November 22, 1915, to dismiss the petition, and to make such order as to costs as the Court might deem just.

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The petitioner, in his answer to the plea of the King's Proctor, stated that from the date of his marriage in 1907 until after his wife finally left him on February 25, 1913, he never committed adultery; he admitted that after he applied for leave to sue for a divorce as a poor person (but not before) he committed adultery with May Gwendoline Predith, a single woman, and that she on or about May 19, 1915, gave birth to a child of which he (the petitioner) was the father.

Paragraph 3 of the answer was as follows: "That he did not knowingly or wilfully conceal from the Court any material facts; that he did not know that his right to obtain a divorce was affected by his committing adultery after his wife had finally left him and was living as the wife of the co-respondent. He admits that he did not inform his solicitor or the Court of the said adultery committed by him, but he would have done so if he had known that it was a material fact necessary to be told to the Court in the said suit."

Paragraph 4: "That the said May Gwendoline Predith is entirely dependent on the petitioner and the petitioner has provided her with a home since her father turned her away just prior to the birth of the said child."

Paragraph 5: "That the petitioner became intimate with the said May Gwendoline Predith in the belief that he was absolutely entitled to a divorce from his wife and would be at liberty to make the said May Gwendoline Predith his wife; that he is willing to marry the said May Gwendoline Predith; and he asks the Court to excuse his ignorance and mistake, and to exercise its discretion in favour of the said May Gwendoline Predith and the petitioner."

Hollis Walker, K.C., and *Talbot-Ponsonby* (for the *Hon. Victor Russell*, on military service), for the King's Proctor, having opened the facts, including the admission in the answer, and the petitioner having given evidence,

Samuel Moses, for the petitioner, submitted that each case must depend upon its own particular circumstances. In the present instance the petitioner, a poor person, was ignorant of the duty to disclose to the Court at the hearing of his petition the fact of his own adultery, the fact being that this adultery was not

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committed until some considerable time after the final separation of the parties.

Hollis Walker, K.C., in reply. The Court should consider the matter in the interests of public morality.

Low J. In this case it was clearly proper for the King's Proctor to bring the facts before the Court. He could not have done otherwise.

The case set up by the petitioner is that, after his wife had left him for some eighteen months, he applied to the proper department for leave to institute proceedings for divorce as a poor person. He admits that after he made that application and obtained leave—there is some doubt whether it was not before he obtained leave—he himself committed adultery.

He says that no one told him that this fact ought to be disclosed to the Court on the hearing of his petition.

It seems to me that the first question for me to consider is this: Did the petitioner, in withholding this fact from the Court, act honestly and through ignorance? I am inclined to think that he did.

The question is whether in a case of this kind, in which a petitioner in humble life, and obviously an ignorant man and one who is the least likely to understand and appreciate the subtleties underlying such matters, honestly believes that he is not bound to impart information, the Court should be influenced by these facts and circumstances. I think that it should.

I do not see how the law is to be administered so as to be acceptable to reasonable persons unless allowance is made for the want of knowledge on the part of persons in humble life.

It is, indeed, urged that I should consider the effect on public morals; but each case must be considered and dealt with in the light of its own set of facts and circumstances.

In the present case I find as a fact that this petitioner did not know that the adultery he now admits was a material fact and that it ought to be brought to the knowledge of the Court at the time when his petition was heard; and, further, that no one told him what he should do.

This being so, and without wishing to create any precedent, I

think I am justified in exercising in his favour the discretion vested in the Court, and I shall not rescind the decree nisi.

The King's Proctor's intervention will, however, be allowed, with the usual order as to costs.

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Solicitors : *Geoffrey S. Crawshay ; The King's Proctor.*

H. D. G.

IN THE ESTATE OF DAVID GRIFFITHS, DECEASED.

MORGAN *v.* STEPHENS AND ANOTHER.

[1916 M. 730.]

1917

Jan. 31.

Administration de bonis non—Rival Claimants to Grant—Will—Construction.

A devise or bequest over, in terms made dependent upon the marriage of the donee of the preceding estate, is to be extended, by implication, so as to take effect on the determination of that estate by the death of such donee.

The testator by his will gave all his property to his wife "during her widowhood," and after her death directed that the property should belong and be made over to the child or children "issue of our marriage"; should, however, the widow remarry, "then the whole of my property shall at once be made over legally to the offspring of our marriage and if they are minors the whole to be under trusteeship"; also, should the issue of the marriage "die out," then on the remarriage of the widow the testator directed that the property should be made over to "the legal next of kin and heirs descendants of my family." No appointment of executor or trustee was made in the will.

The widow, who did not marry again, took out letters of administration in 1883 with the will annexed, and, having intermeddled in the estate, died in November, 1915, leaving a will and appointing executrices, who duly proved the same, and in March, 1916, as such legal personal representatives, obtained a grant of letters of administration to the estate of the testator's only child, who died in 1887, aged eleven years.

Upon a suit in the Probate Division for letters of administration de bonis non with the will of the testator, David Griffiths, annexed :—

Held, that the child of the testator did not take a vested interest, but only an interest contingent upon his surviving the remarriage

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or death of his mother, the testator's widow, and that the grant now sought should go to the plaintiff, a daughter of the testator's deceased brother and one of the testator's next of kin, as against the defendants who claimed the grant as the executrices of the widow.

ADMINISTRATION SUIT.

The plaintiff, as the daughter of the deceased's eldest brother, William Griffiths, deceased (who died on March 15, 1883, intestate), and one of the next of kin, claimed, in the events which had happened, to be one of the persons entitled to the residue of the personal estate of the testator, David Griffiths, deceased, who died on February 8, 1883, at San Francisco, having made and executed his last will and testament, dated August 1, 1882, without naming an executor.

On October 19, 1883, letters of administration with the said will annexed were granted to his widow, Hannah Griffiths, the universal legatee for life or widowhood named in the will. She intermeddled in the estate, and died on November 22, 1915, without having remarried, but leaving part of the estate unadministered.

On March 15, 1887, David William Griffiths, the only child of the testator, died, aged eleven years.

The defendants, as executrices of the will of Hannah Griffiths, the testator's widow, obtained on March 25, 1916, a grant of letters of administration of the estate of the child, David William Griffiths.

The defendants alleged that the estate of the deceased David Griffiths was insolvent, and they submitted that a further grant of administration was unnecessary, but, by way of counter-claim, they said that, if the Court thought otherwise, they claimed that such grant should be made to them "as the administratrices of David William Griffiths."

The plaintiff, in her reply and defence to the counter-claim, said that, the widow of the testator having only a life interest under his will, the gift over took effect on her death, and therefore the defendants, as the widow's executrices, had no interest in the testator's estate. Further, that the only child died in the lifetime of his mother, and, as she took a life interest in the testator's estate, the gift over took effect on failure of issue, and the executrices of the tenant for life had "no interest in the estate of the said deceased

as administratrices of the estate of the said David William Griffiths " ; and she denied that the estate was insolvent, as alleged by the defendants.

The will upon which this dispute arose was in these terms :—

" I, David Griffiths, belonging to Saint Dogmells, Wales, master mariner, do herewith will and bequeath to my wife Hannah Griffiths née Williams all that I possess in property or possessions of whatsomever [*sic*] nature they may be for her sole use during her widowhood after death then the whole of the property shall belong and be made over to the child or children issue of our marriage in equal parts : should however at any time the said Hannah Griffiths remarry then the whole of my property shall at once be made over legally to the ofspring [*sic*] of our marriage and if they are minors the whole to be under trusteeship. Also should the issue from my marriage with my present wife Hannah Griffiths née Williams die out then on the marriage of my widow the whole of my property shall be made over to the legal next of kin and heirs descendants of my family. This will is drawn out with the cognizance of my wife and in accordance with her wishes and she herself has read over the same and witnessed not only mine but several signatures attached thereto.

" D. Griffiths.

" Witness of signature . . John O. Williamson
" Do. F. Oldrey
" Hamburg, August 1st, 1882."

Percy F. Wheeler (*W. O. Willis* with him), for the plaintiff. Although the gift over on failure of issue is only expressed to take effect on the remarriage of the widow of the testator, still it took effect on her death : *Underhill* v. *Roden*. (1) That rule should be applied here. As the widow took a life interest, the gift over took effect on failure of issue during the lifetime of the widow. The word " family " which appears in the will is a very elastic term. The testator's intention was to provide for the devolution of his estate in the event of the issue of his marriage failing. The words " my family " should be construed as " my stock " : *Blackwell* v. *Bull*. (2) The expression he used in the will exactly fitted the case ; the issue

(1) (1876) 2 Ch. D. 494. (2) (1836) 1 Keen, 176.

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did "die out." He knew he had a wife and he knew he had a child, and he went on to provide what should happen to his property when they died. He desired it to go to his next of kin as though he had died a bachelor and intestate. In *Clapton* v. *Bulmer* (1) the contest was between those who claimed through one or another person. The Court is asked to apply the same principles here.

A. L. Briscoe, for the defendants. Nothing can be clearer than that the child of the testator took a vested interest. *Underhill* v. *Roden* (2) is the converse of the present case and is distinguishable. In that case there was no clear gift to the children as there is here. It is *only* on the remarriage of the widow (which never happened) that the property was to go over. "Not leaving children" is construed to mean "not leaving a child who took a vested interest" *In re Cobbold.* (3)

Percy F. Wheeler in reply. Sir George Jessel M.R. refers to and quotes (4) from two cases on the first page of his judgment in *Underhill* v. *Roden* (2) as showing that the rule of construction referred to and approved by him was already quite clear.

Low J. In this case the difficulty arises upon the construction of the will of David Griffiths, deceased, which was apparently prepared by the deceased himself in consultation with his wife.

In due course administration with the will annexed was granted to his wife, who became his widow. She is now dead, and a grant of letters of administration de bonis non is sought by two persons—(1.) by a daughter of the deceased's eldest brother, William Griffiths, who, in the circumstances which have happened, is one of the next of kin of David Griffiths; and (2.) by the executrix of the widow of David Griffiths, who, in the events which have happened, became entitled to administer the effects of the only child of the testator, who survived him but died in the lifetime of his widow.

(1) (1840) 5 My. & Cr. 108.
(2) 2 Ch. D. 494.
(3) [1903] 2 Ch. 299.
(4) NOTE BY THE REPORTER.—The language attributed by Sir George Jessel M.R. to "another distinguished judge" (Wood V.-C.), and which the report in 2 Ch. D. at p. 497 gives him as quoting from Johnson's Reports ("John. 210, 214"), appears in the course of the arguments in the report of *Browne* v. *Hammond* in Johnson's Reports.

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LOW J.

I have to determine to which of these two parties the grant should go.

It is admitted on both sides that this depends upon the proper construction of the testator's will, and it really comes to this: Did David William Griffiths, the infant child of the testator, take a vested interest, or only an interest contingent on being alive at the time of the death or remarriage of his mother, Hannah Griffiths, the testator's widow?

Several cases have been cited, and my attention has particularly been directed to the judgment of Sir George Jessel M.R. in *Underhill* v. *Roden* (1), where he refers to the earlier cases of *Eaton* v. *Hewitt* (2) and *Browne* v. *Hammond*. (3) That decision and the language of the distinguished judges which he is reported as having quoted appear to me to cover the present case.

I am of opinion that the effect of this will, giving to it the construction which the authorities which have been cited call upon me to give, is this: that the child of the testator took not a vested interest but an interest contingent upon his surviving the death or remarriage of his mother, the testator's widow.

That being so, I hold that the grant should go to the plaintiff, the daughter of the testator's deceased brother.

It is interesting to be told that, whatever grant is made by this Court, there are no assets left to be administered. The case has been conducted with great ability, and three learned counsel have appeared on behalf of the rival claimants to this grant. Therefore I make no order as to costs except that the costs come out of the estate.

Solicitors for plaintiff: *T. D. Jones & Co., for George, Son & Davies, Cardigan.*

Solicitors for defendants: *Holt, Beever & Crowdy, for William John Williams, Cardigan.*

(1) 2 Ch. D. 494. (2) (1863) 2 Dr. & Sm. 184, 192.
(3) (1858) John. 210, 214.

H. D. G.

C. A.
1916
Dec. 5, 19;
1917
Jan. 29.

[IN THE COURT OF APPEAL.]

GAYER *v.* GAYER.

Divorce—Jurisdiction—Practice—Proof of Adultery committed Abroad—Evidence by Affidavit—Commission—Discretion of Court—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 46, 53—*Divorce Rules, rr.* 51, 188.

Leave to prove adultery by affidavit in undefended cases where the witnesses are abroad or for other reasons cannot give evidence in open Court should be rarely given and only as an exceptional indulgence in special circumstances. Recent laxer practice disapproved.

Per Lord Cozens-Hardy M.R. and Warrington L.J.: Where the witnesses are resident abroad or for other reasons cannot attend the Court a commission to take their evidence is preferable to allowing it to be given on affidavit.

Per Scrutton L.J.: There is no such general advantage in commission evidence over affidavits as to lead to a general rule that adultery shall never, or only in special cases, be proved by affidavits in undefended cases.

The petitioner in an undefended suit for divorce asked for leave to prove the adultery of her husband in New York by the affidavits of two witnesses residing there, on the ground that she was of limited means, and that it would be a great saving of expense and trouble if leave were granted. Shearman J., without exercising his discretion, refused her application on the ground that he disapproved the practice of allowing adultery to be proved by affidavit:—

Held, on appeal, by Lord Cozens-Hardy M.R. and Warrington L.J. (Scrutton L.J. dissenting), that, having regard to the earlier practice which was founded on good sense and ought not lightly to be departed from, Shearman J. was justified in refusing to make the order.

Appeal from a decision of Shearman J. refusing to allow the petitioner in an undefended divorce case to prove adultery in a foreign country by affidavit.

On July 10, 1916, Mrs. Gayer filed a petition for divorce, alleging that her husband had been guilty of adultery with a woman who passed as his wife in New York, and that he had deserted her (the petitioner) for two years and upwards. The respondent was served on August 23, 1916, but did not enter an appearance. On November 7, 1916, the petitioner issued a summons for leave to prove

the alleged adultery by affidavit. The summons was supported by the affidavit of her solicitor, who stated that the material and necessary witnesses were two named persons resident in New York, that the petitioner was of limited means, and that it would be a great saving of expense and trouble if the evidence of the two witnesses were allowed to be taken by affidavit. Shearman J. dismissed the summons and gave leave to appeal. He stated that he had set his face against the practice of allowing adultery to be proved by affidavit. He had exercised no discretion in the matter, but invited the Court of Appeal to give him some guidance.

The petitioner appealed.

The appeal came on for hearing on December 5, when the Court ordered it to stand over to enable the King's Proctor to be represented.

1916. Dec. 19. *W. O. Willis*, for the appellant. The practice of the Court with reference to this matter is regulated by the Matrimonial Causes Act, 1857, ss. 46, 53, and the Rules and Regulations, December 26, 1865, rr. 51, 188. Before affidavit evidence can be allowed a direction to that effect must be obtained from the judge. The exercise of the discretion has somewhat varied since 1857. It has recently been almost a matter of course, in undefended suits, to allow proof by affidavit where the witnesses are abroad, or for any other reason their oral evidence cannot be obtained. In *Ling* v. *Ling* (1), an undefended case, affidavit evidence was directed.

[LORD COZENS-HARDY M.R. There the adultery had been proved in two Courts in England.]

In *Potts* v. *Potts* (2) leave was refused, but that was a case of nominal damages. In *March* v. *March* (3) proof by affidavit of bigamy with adultery was allowed where the witnesses lived at Oldham and Huddersfield. The cases in which applications for leave have been made are conveniently collected in a note at the end of the report. All those cases were in 1858 and before the existence of the office of King's Proctor. In *M'Kechnie* v.

(1) (1858) 1 Sw. & Tr. 180.
(2) (1858) 1 Sw. & Tr. 181; 27 L. J. (P. & M.) 59.
(3) (1858) 28 L. J. (P. & M.) 30.

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M'Kechnie (1), which was a suit for dissolution, the marriage was allowed to be proved by affidavit. *B.* v. *C.* (2) was a suit for nullity, and by consent of the respondent the petitioner's evidence was allowed to be given on affidavit. But the consent was immaterial; it was for the Court to exercise its discretion, and the fact allowed to be proved went to the whole root of the petition. In *Macartney* v. *Macartney* (3), where the respondent to a petition for dissolution on the ground of adultery coupled with bigamy had been convicted of bigamy, and the witnesses to prove the bigamy resided at a distance and could not be produced without considerable expense, the Court permitted the evidence to be given on affidavit.

[LORD COZENS-HARDY M.R. The only thing allowed to be proved was the bigamy.

SCRUTTON L.J. And in *March* v. *March* (4) it was only the conviction for bigamy that was to be proved.]

In *Adams* v. *Adams* (5), a husband's suit for dissolution, where the petitioner resided in Australia, the Court allowed the preliminary facts of the cohabitation and separation to be proved by affidavit. That is the first case in which it was said that the Court would never allow the substantive part of the case to be proved by affidavit. In *Ellam* v. *Ellam* (6) and *Burslem* v. *Burslem* (7) adultery was allowed to be proved by affidavit, but in the former case the Court intimated that it must not be taken as a precedent in such cases. In *Ex parte Hobson* (8) the marriage and cohabitation of the parties were allowed to be proved by affidavit. See also *Bailey* v. *Bailey*. (9) In *Simpson* v. *Simpson* (10) Bigham P. allowed adultery and bigamy to be proved by affidavit. [He also referred to *Daubeney* v. *Daubeney*. (11)]

From 1858 onwards the Court has endeavoured to help litigants in certain circumstances by relaxing the rule as to the necessity for oral evidence. The recent practice has been almost universal in undefended cases to allow evidence by affidavit. All that is asked

(1) (1859) 1 Sw. & Tr. 550; 28 L. J. (P. & M.) 31.
(2) (1863) 32 L. J. (P. & M.) 135.
(3) (1866) L. R. 1 P. & M. 259.
(4) 28 L. J. (P. & M.) 30.
(5) (1873) 29 L. T. 699.
(6) (1889) 61 L. T. 338.
(7) (1892) 67 L. T. 719.
(8) (1894) 70 L. T. 816.
(9) (1909) *The Times*, January 14.
(10) (1909) Unreported.
(11) (1916) Unreported.

in this case is that the evidence of two independent witnesses abroad as to the fact that the husband is living with a woman other than his wife may be given on affidavit. The discretion of the Court ought to be exercised in favour of the applicant.

Sir Gordon Hewart, S.-G., and *D. Cotes-Preedy*, for the King's Proctor. The question of granting or refusing leave is one of discretion for the judge. The King's Proctor does not desire to express any view as to the practice, but he does not think any general principle has been laid down. Upon the authorities, where the substantive portion of the case is concerned it is not the practice to allow proof by affidavit.

[SCRUTTON L.J. Is there any advantage in a commission over affidavits ?]

The King's Proctor sometimes gets information through a commission which would not have been obtained if an affidavit had been prepared in the ordinary way by a solicitor and sworn by the witness. If a rule were laid down it might have mischievous results.

Cur. adv. vult.

1917. Jan. 29. LORD COZENS-HARDY M.R. This appeal raises a highly important question as to the propriety of admitting affidavit evidence in proof of adultery in proceedings in the Divorce Court. The jurisdiction of the Divorce Court is purely statutory. It has existed for sixty years. It has many peculiar features. No judgment for divorce can be obtained by consent. Allegations by a petitioner, if not denied by the respondent, are not to be taken as true, as they would be in litigation in other Divisions of the High Court. The reason for these peculiarities is, I apprehend, that the Legislature has recognized that the dissolution of a marriage involves considerations of a public nature which do not exist when an ordinary contract between two persons is sought to be set aside.

The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), which is still the governing statute, so far as the present appeal is concerned, provides in s. 46 how evidence is to be taken. This section provides : " Subject to such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the Court when their attendance can be had shall be sworn and examined

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orally in open Court: Provided that parties, except as hereinbefore provided, shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed."

The language of the section is somewhat obscure, but it certainly does not entitle a petitioner, *as of right*, to prove adultery by affidavit in every case where the attendance of witnesses cannot be had in open Court. The uniform practice has been to apply for and obtain an order giving liberty to prove by affidavit. Rule 188 of the Divorce Rules makes this clear.

In the early days of the Court there was a good deal of discussion as to the extent to which the discretion given by s. 46 ought to be exercised. The Court steadily set its face against allowing the fact of adultery to be proved by affidavit, although other facts necessary for proof of the petitioner's case, such as the marriage and domicil and separation,—what Sir James Hannen in *Adams* v. *Adams* (1) described as "the mere fringe of the case"—might be so proved.

In recent years there has been a great relaxation in the practice, especially in undefended cases. And it has come to be considered sufficient to show that the adultery alleged was in foreign parts, and that the costs of a commission would be heavy. Mr. Willis informed us that in undefended cases he had never known such an application to be refused. I presume the same relaxation would be allowed when the attendance of witnesses could be had only at a cost beyond the means of the petitioner.

The matter comes before us in an unusual form. On July 10, 1916, Mrs. Gayer filed a petition alleging that her husband had been guilty of adultery with a woman who passes as Mrs. Gayer in New York, and had deserted her (the petitioner) for two years and upwards. The respondent was served on August 23, 1916, but he did not enter an appearance. On November 7, 1916, Mrs. Gayer issued a summons for leave to prove the adultery alleged by affidavit.

(1) 29 L. T. 699.

The summons was supported by the affidavit of her solicitor, which stated that two named gentlemen in New York "are material and necessary witnesses to prove the adultery alleged, and are the only persons known to Mrs. Gayer or to him" who can be called to prove the alleged adultery. And the affidavit added: "The petitioner is a lady of limited means, and it will be a great saving of expense and trouble if the evidence of the two gentlemen is allowed to be taken by affidavit."

Shearman J. dismissed the summons and gave leave to appeal. He invited the Court of Appeal to give him some guidance. His opinion was in favour of the older practice and against the more modern view. We have had the advantage of the assistance of the Solicitor-General, as representing the King's Proctor. I think that it is our duty to help the learned judge, but I disclaim any right to interfere with his discretion. It is clear to my mind that the discretion given by s. 46 extends to an affidavit to prove adultery in exceptional circumstances. But I do not think that it is a reasonable ground for admitting the affidavit that the expense of a commission will be saved. The practice which existed for forty years seems to me to have been founded on good sense and ought not to be lightly departed from.

It is argued that a commission to take evidence is both expensive and unsatisfactory and is no better than an affidavit. I cannot assent to this argument. Undefended cases in the Divorce Court are notoriously open to collusion, and the King's Proctor has practically no means of detecting it. The nature of the evidence required ought to be the same in an undefended action as in a defended action.

It follows from what I have said that in the circumstances of the present case the learned judge was justified in refusing to make the order. The appeal must be dismissed.

WARRINGTON L.J. The proceeding in which the present question arises is a wife's petition for dissolution of her marriage by reason of the husband's adultery and desertion. The suit is undefended.

The acts of adultery are alleged to have been committed in New York, and the petitioner desires to prove them by the affidavits of two witnesses resident in that city. She accordingly applied to

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Shearman J. for the necessary leave. Her application was refused, not, as I understand, because, on the facts, he thought the petitioner had not made out a case for the exercise in her favour of the discretionary power vested in the judge, but because he personally does not approve of the practice which has recently sprung up of granting such applications almost as a matter of course when the necessary witnesses are resident abroad, and desires to have a pronouncement by this Court as to the practice to be adopted in future.

It must, I think, be considered a settled principle of the administration of justice in this country that at the final trial of causes involving the determination of issues of fact the evidence shall wherever it is reasonably possible be taken orally before the tribunal itself. The practice of the Court of Chancery of determining questions of fact on affidavit evidence is an exception which only proves the rule, inasmuch as, since the coming into operation of the Judicature Acts and the Rules thereunder, the practice of the Chancery Division in this respect has been brought into line with the Courts of common law. Provision has from time to time been made by statute or rules for the examination on commission of witnesses whose attendance at the trial cannot be secured and for proving certain particular facts by affidavit, of which the Bankers' Books Evidence Act is an example, but the general principle remains unaffected. I do not forget that in matrimonial suits the practice of the Probate, Divorce, and Admiralty Division is governed by special statutory rules; but these rules themselves, in my opinion, recognize the general principle to which I have referred, though they confer on the judge a power to relax it if in his discretion he thinks fit so to do. For the purpose of applying the general principle the fact of adultery must in every suit, whether defended or not, be treated as in issue, inasmuch as the petitioner can never obtain a decree upon admissions as a plaintiff can obtain a judgment in the King's Bench Division or in the Chancery Division. The statutory rules to which I have referred above are as follows. The first is s. 46 of the Matrimonial Causes Act, 1857. This has been read by the Master of the Rolls, and it is unnecessary to read it again. The power to make rules and regulations concerning the practice and procedure under the Act is conferred by s. 53.

The only material rules are No. 51 made in 1867 and No. 188 made in 1875. [The Lord Justice read the rules and continued :]

On the construction of the Act and Rules it is common ground that before any of the facts alleged can be proved by affidavit a direction of the judge to that effect must be obtained, and that the granting or refusing such a direction is in his discretion. Then arises the question on what general lines should the discretion be exercised where, as in the present case, the fact sought to be proved is the alleged adultery. Should the direction be regarded as an exceptional indulgence to be granted only in rare cases and on special facts justifying a departure from the general principle as to the mode of proof, or should it be treated as almost a matter of course in undefended suits where the witnesses are abroad or their evidence in open Court can for other reasons not be obtained ?

I will now as shortly as may be refer to the authorities which have been cited to us. In 1858 evidence by affidavit was allowed where the petitioner had already obtained a sentence of divorce a mensa et thoro and had recovered substantial damages in an action against the co-respondent for crim. con. : *Ling* v. *Ling* (1) ; but the application was refused in *Potts* v. *Potts* (2), where the damages recovered were nominal only. In the same year the petition generally was allowed to be proved by affidavit, the misconduct alleged being bigamy and adultery and the husband having been tried for bigamy before the judge himself and convicted : *March* v. *March*. (3) In a note to the report of this case it is stated that numerous applications had been made to allow petitions for dissolution of marriage to be proved by affidavit, which had uniformly been refused, except in *Ling* v. *Ling* (1), and in another case, in which the facts were similar ; a list of cases in which leave was refused is given. The only other recorded cases prior to 1889 were a few in which evidence of particular facts, such as the marriage of the parties and in one case the fact of bigamy, were allowed to be proved by affidavit : see *Macartney* v. *Macartney* (4) and *Adams* v. *Adams* (5), in which latter case Sir James Hannen said : " The Court would never allow the substantive

(1) 1 Sw. & Tr. 180.
(2) 1 Sw. & Tr. 181 ; 27 L. J. (P. & M.) 59.
(3) 28 L. J. (P. & M.) 30.
(4) L. R. 1 P. & M. 259.
(5) 29 L. T. 699.

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portion of a case to be proved by affidavit, but as what you propose thus to prove is only preliminary and introductory matter—what may be called the mere fringe of the case—the motion may be granted." In *Ellam* v. *Ellam* (1) desertion and bigamous marriage were proved, but the evidence of adultery was not satisfactory, and Butt J. allowed further evidence of this fact to be given by affidavit. The note of the case, however, contains the following passage: "It was, however, expressly stated by the learned judge that he wished it to be clearly understood that his indulgence was wholly exceptional, and that it was not by any means to be taken, that the Court would easily yield to applications of this kind."

The first trace of a less strict view is found in *Burslem* v. *Burslem*. (2) In that case a bigamous marriage and the subsequent adultery were allowed to be proved by affidavit, the witnesses residing in America, but there was evidence that the expenses of a commission would be beyond the means of the petitioner. The judge may have thought this fact was sufficient to justify the exercise of his discretion in favour of the petitioner, as otherwise the result might be a denial of justice. So far, with the possible exception of *Burslem* v. *Burslem* (2), the judges clearly acted on the principle that the direction in question ought to be treated as, to say the least of it, a very exceptional indulgence to be granted only where the special facts of the case appeared to justify it, and that the mere fact that witnesses resided abroad was not sufficient. In and after 1908, however, a different practice appears to have been adopted. The first recorded instance is *Bailey* v. *Bailey*. (3) In that case the order was made by Sir Gorell Barnes J. on the sole ground that the witnesses resided abroad and that expense would be saved. In one unreported case a similar order was made by Sir J. C. Bigham P.—*Simpson* v. *Simpson* (4); but in that case the respondent had committed bigamy. We are informed by counsel of wide experience (Mr. Willis) that Bargrave Deane J. habitually makes such an order where the witnesses reside abroad, and in fact he told us that in his own practice he has never known it to be refused in an undefended suit. I have come to the conclusion that the earlier practice was

(1) 61 L. T. 338.
(2) 67 L. T. 719.
(3) (1909) *The Times*, January 14.
(4) (1909) Unreported.

the more correct one, and that a relaxation of the general rule that the fact of adultery should be proved by oral evidence ought to be treated as a very exceptional indulgence to be granted only on the proof of special facts sufficient in the opinion of the judge to justify it. I purposely state what I think is the proper principle to be adopted in the general terms employed above, for I think it is undesirable, even if it were possible, for this Court to attempt to fetter any further the discretion of the judge which in my opinion exists in reference to the fact of adultery as well as to other facts of minor importance.

I will refer only to one other subject of discussion before us. The Court has power where witnesses cannot attend the Court, either because they reside abroad or for any other reason, to order their evidence to be taken on commission, but it is contended that if this can be done their evidence might just as well be given by affidavit. I cannot accept this contention. As a judge who has had considerable experience of affidavit evidence, I think it is in cases of disputed fact a most unsatisfactory mode of proof. The affidavits are usually prepared by the legal advisers,—they are not expressed in the words of the witnesses themselves—and, without intending to suggest any impropriety on the part of those who prepare them, they naturally contain just such statements as are necessary to prove the case and no more. On the other hand, evidence given on commission is given in the witnesses' own words and is much more likely to contain the whole truth, even where there is no cross-examination. The Solicitor-General, on behalf of the King's Proctor, expressed his preference for evidence on commission as compared with evidence by affidavit, and in my opinion such preference is well founded.

I now turn to the particular case. There are only two witnesses whose evidence is required. They are both resident in New York, and therefore one commission only would be necessary, and I should suppose that the evidence would be short and the expense not excessive. The only other material statement in the affidavit is that the petitioner is a lady of limited means and that it would be a great saving of expense and trouble if the evidence were allowed to be taken by affidavit. In my opinion these facts would not justify the exceptional indulgence asked for, and I think, therefore,

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the order of Shearman J. refusing the petitioner's application was right, and this appeal should be dismissed.

SCRUTTON L.J. This appeal raises an important question as to the method in which evidence shall be given in undefended divorce cases. Mrs. Gayer has presented a petition for the dissolution of her marriage, alleging against her husband desertion and adultery in the United States. The husband has been served, but does not appear. The wife thereupon applied to Shearman J., who was taking divorce business, for leave to prove the adultery by affidavits of independent witnesses in the United States. The learned judge refused to make any order that adultery should be proved by affidavits, stating, as the appellant's counsel told us he was requested to inform us, that he did not use his discretion in the particular case, but had set his face against proving adultery by affidavits in any case. He gave leave to appeal, and asked for the directions of the Court of Appeal. The Matrimonial Causes Act, 1857, s. 46, reads as follows : [The Lord Justice read the section and continued :] This shows that where the attendance of witnesses can be had they should be examined in open Court, but that their evidence may be given on affidavit subject to this, that they may be required to attend in open Court for cross-examination if requested (1.) by the opposite party, (2.) by the Court. In an undefended case the opposite party makes no such request, and the question is under what circumstances the Court, by requiring attendance of the witnesses in Court, should make the statutory leave to give affidavit evidence useless. We were referred to a number of cases in which orders of various kinds had been made or refused. Broadly speaking, for some forty years after the institution of the Divorce Court such orders were rarely made, and very rarely indeed for the proof of the vital fact of adultery. For the next twenty years down to the present time such orders were made in undefended cases with increasing frequency, until now they are made in large numbers, allowing affidavits to be used for proof of adultery as well as more formal matters. In the first period affidavit evidence was allowed to prove bigamy in a conviction for bigamy : *March* v. *March* (1) ; *Macartney* v. *Macartney* (2)—previous proceedings for

(1) 28 L. J. (P. & M.) 30. (2) L. R. 1 P. & M. 259.

criminal conversation, where the damages were substantial; *Ling* v. *Ling* (1), but not where they were nominal: *Potts* v. *Potts* (2) and the marriage and cohabitation: *M'Kechnie* v. *M'Kechnie.* (3) But the Court set its face against trying adultery on an affidavit. In *Walton* v. *Walton* (4) Sir Cresswell Cresswell said: "I cannot consent to so serious a matter as dissolution of marriage being tried on affidavits." In *Adams* v. *Adams* (5), in 1873, Sir James Hannen allowed domicil, cohabitation, and separation, which he called "the mere fringe of the matter," to be proved by affidavit, but said "The Court would never allow the substantive portion of a case to be proved by affidavit." In *Ellam* v. *Ellam* (6), in 1889, Butt J. allowed affidavits as to adultery to supplement a commission to the United States and save a second commission, but said this indulgence was wholly exceptional, and that it was not by any means to be taken that the Court would easily yield to applications of this kind. In 1892, in *Burslem* v. *Burslem* (7), Barnes J. allowed evidence to be given by affidavit from the United States to prove bigamy, adultery, and identity of the husband, it being stated that the witnesses were all resident in America and that the expenses of a commission would be beyond the means of the petitioner. From that time under Lord Gorell, Lord Mersey, Sir Samuel Evans, and Bargrave Deane J. affidavits were allowed in undefended cases with much greater frequency. Bargrave Deane J., who himself had had a very extensive practice in the Divorce Court, seems to have made a very large number of such orders. Mr. Willis, counsel for the appellant, told us that he had made many applications to give evidence of adultery by affidavit in undefended cases and had never been refused. Under these circumstances the first question is whether Shearman J. was right in declining to exercise discretion in each case, but stating as a universal principle that he would never make an order allowing adultery to be proved by affidavit. My brothers do not treat him as having said this. I can only say that, if Mr. Willis has correctly reported what the judge

(1) 1 Sw. & Tr. 180.
(2) 1 Sw. & Tr. 181.
(3) 1 Sw. & Tr. 550; 28 L. J. (P. & M.) 31.
(4) 28 L. J. (P. & M.), note at p. 31.
(5) 29 L. T. 699.
(6) 61 L. T. 338.
(7) 67 L. T. 719.

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asked him to tell the Court of Appeal, I think I have correctly stated the course he has adopted. This amounts to saying that in a case where the affidavit was only corroborative of other oral evidence given in Court, and the petitioner would be called in open Court, and the witness was at the other end of the world, and a commission was far more expensive than an affidavit and its expense was beyond the means of the petitioner, the judge should not even allow the affidavit to be made and read, reserving to himself the right to require the attendance of the witness, if at the trial he found circumstances of suspicion. I find no such general rule in the Act which confers jurisdiction, and I think no such general rule should be followed; each case should be considered on its own circumstances. If the judge had exercised his discretion on the facts of this case, I should have held that we could not have interfered whether he had made the order or refused it. He has told us he did not exercise discretion. It would be enough to say this and send the case back to the Divorce Court; but the judge asks for directions, and I think to a limited extent we can give them. The facts in this case are that the petitioner alleges that her husband has deserted her and gone to the United States, where he is living in adultery. She proposes to prove a letter from him stating that he has gone through a form of marriage with another woman, with whom he is living. He has been served with the petition and signed a document acknowledging service. The petitioner is ready to give evidence in open Court. The affidavits may be used amongst other purposes to corroborate the confession. Under these circumstances I can see no reason why the order should not be made, reserving to the judge the right at the trial, if he is not satisfied, to direct the witness to attend. The learned judge apparently asks for general directions, and these, I think, it is almost impossible to give, for the facts of each case vary. But I would say this: It has been made a reproach to the divorce law of England that it is a law for the rich and not for the poor. Maule J.'s well-known ironical sentence in an unreported bigamy case (1) pointed out before the Act of 1857 that the law of England said to rich and poor alike "You may have

(1) See The Builders of Our Law under Queen Victoria, by Edward Manson (2nd Ed. 1904), p. 68. There are several slightly different versions in print.

a divorce through a procedure which will cost 500*l.* or so," and when the poor man said "But my wife is living in adultery, and I have not 500 pence," replied that the just law of England made no difference between rich and poor. Since the Act, while both in civil cases and criminal cases the subject has justice brought into his county, in divorce he must bring his witnesses from Cornwall or Newcastle to London, and no poor man can get an undefended divorce without an expenditure of forty or fifty pounds. Any High Court judge who has tried many cases of bigamy knows how many result from the inability of the poor man to find the money for divorce and the desire of himself and the woman to look respectable by going through a second form of marriage. In my view it should be the aim of the Court to make its justice as cheap and accessible as is consistent with a reasonable amount of security against its being deceived. When the adultery is committed abroad, how is the evidence to be obtained? One alternative is a commission. The experience of most of those who have practised in many cases where evidence is required on commission is that this method is extremely expensive and unsatisfactory. Neither the officials who take commissions nor the lawyers who conduct them are under the control of the Court. Both are generally accustomed to another system of procedure. They have a tendency to regard the commissions as welcome additional sources of income, and have no particular motive to shorten and cheapen them. The King's Proctor tells us that sometimes in commissions incidental remarks of the witnesses have proved valuable as clues. I doubt whether this in the long run is sufficient advantage to counterbalance the greatly increased expense which has led that part of the King's Bench Division which deals with commercial disputes to abandon commissions entirely. There is always fear of collusion in undefended divorce cases, or of the Court being deceived. But I do not think the risk is of an unfounded charge of adultery being submitted to in order to obtain a divorce, but rather that the petitioner suppresses his or her own guilt and the respondent holds his or her tongue about it. This risk, as far as I can see, is not avoided by commission evidence as opposed to affidavits. Once it is agreed that the English Court will dissolve marriage by reason of adultery committed abroad without requiring the witnesses to attend the

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Court in person—and any other course would, I think, be a denial of justice—I can see no such general advantage in commission evidence over affidavits as to lead to a general rule that adultery shall never, or only in special cases, be proved by affidavits in undefended cases. It is another thing to say that the Court is always bound to believe them. The fact that an affidavit has been prepared in this country and not in the country in which it is sworn may well be considered by the Court as an unsatisfactory feature calling for very close examination of the circumstances. While the recent Poor Persons procedure has rendered it easier for poor people in England to obtain divorces in undefended cases, it is still open to objection that no funds have been provided for legal advisers or expenses of witnesses. This objection is specially true if commissions are to be required, as commissioners and lawyers in foreign countries will not work for poor persons for nothing, while the expenses of affidavits are comparatively slight. I do not think it is possible to lay down any more general rule than that there is to be no rule against proving adultery in foreign countries by affidavit, but that each case is to be dealt with on its own special facts. I should propose to allow the appeal and remit the case to the Divorce Court for further consideration. My brothers, however, disagree. I think the reason of our difference is that in the first place they understand the message conveyed to us by the learned judge as to the reasons for his decision in a different sense from myself and think he exercised a discretion when I understand him to say he did not, and that in the second place they are more impressed with the desirability in the public interest of avoiding even the remote possibility of mistake or collusion; and I am more impressed with the desirability of making justice sufficiently cheap to be accessible to the poor, even at the risk of some lack of certainty. In my view each judge of the Divorce Court will still have to use his discretion in each case after considering the views expressed in these judgments.

Solicitors for appellant: *Iliffe, Henley & Sweet.*
The King's Proctor.

G. A. S.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

(In Prize.)

1917
Feb. 21;
March 5.

THE BALTO.

[1915, No. 821.]

Prize Court — Contraband — Doctrine of Continuous Voyage — Raw Material destined for Neutral Factory—Product of Raw Material destined for Enemy—Discovery of Documents—Ambit of Discovery.

A quantity of leather (contraband) consigned to the claimants, a firm of boot manufacturers in a neutral country, was seized as prize ex a neutral ship on the ground that it was either destined for the enemy as leather, or was going to the claimants' factory to be there made into military boots which were destined for the enemy forces.

An application on behalf of the Crown for an order for discovery of the claimant's books and documents relating to the sales of leather and boots from the year prior to the outbreak of war down to the date of seizure was resisted, inter alia, on the ground that if the leather was going to be made into boots the doctrine of continuous voyage did not apply, and therefore, whatever the ultimate destination of the boots, the leather could not be seized as prize :—

Held, (*a*), that contraband material, imported into a neutral country to be there manufactured into goods destined for the enemy, does not become part of the common stock of the country so as to defeat the doctrine of continuous voyage; and (*b*) that accordingly an order could be made directing the claimants to make discovery of the books and documents relating to their sales of boots as well as of leather from August, 1913, down to the date of seizure.

Summons adjourned into Court for Argument.

This application, which in form was a summons for discovery, raised the question whether the doctrine of continuous voyage can apply to contraband goods (leather) imported into a neutral country, there, as alleged by the Crown, to be manufactured into other contraband goods (military boots) destined for the enemy.

The goods in question, seventy-four bales of sole leather consigned from Boston, U.S.A., to the claimant, Ernst Aquist, manager of the Skofabriks Aktiebolaget Oscaria, of Orebro, Sweden, were seized ex the Norwegian steamship *Balto* at Kirkwall on November 2, 1915.

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On November 24, 1915, a writ in prize was issued claiming condemnation of the goods as contraband destined for the enemy.

According to the affidavit of the claimant he bought the leather on or about September 2, 1915, from a Boston firm and paid the purchase price, 38,565 kroner, on or about November 5 ; the leather was intended solely for consumption in the Swedish factory, and none of it was for exportation or for an enemy destination.

On February 8, 1917, the present summons was taken out at the instance of the Procurator-General for an order that " the claimant do within fourteen days make discovery upon oath of all books of accounts, letter-books, and usual commercial documents relating to the matters in question, and in particular ordinary business books from January 1, 1913, up to the present time showing all purchases of leather and all sales and proposed sales of leather and boots since January 1, 1913, together with all contemporaneous cables and correspondence relating to such sales or proposed sales."

No evidence had been filed on behalf of the Crown when the summons came on for hearing, but the Attorney-General stated that the Procurator-General was prepared to file an affidavit showing a prima facie case that the leather or the boots made therefrom were destined for the enemy, and on February 24 this was done.

1917. Feb. 21. *Sir Frederick Smith, A.-G., MacKinnon, K.C.*, and *Theobald Mathew*, for the Procurator-General. The broad question on which this application depends is whether or not the Crown had a right to stop this consignment as being contraband material going to the enemy. The Court is not restricted in its vision to the primary destination of these goods ; it is entitled and bound to take a more extended outlook : *The Kim.* (1) The claimant's contention is that by going into the Swedish factory the goods would be " absorbed into the common stock " of the country. It is submitted that " absorption into the common stock " means for purposes of consumption and not for purposes of manufacture. There is hardly a contraband commodity which, on the claimant's contention, could not enter freely the enemy country if it was exempt from seizure provided it underwent some process of manufacture in the neutral country. It must be assumed for the purposes of this

(1) [1915] P. 215, 275.

application that there is prima facie evidence of ultimate enemy destination ; if so, these goods were rightly seized, and the Crown is entitled to such information from the claimant as he alone possesses and which would show whether the goods were going to the enemy or not. The ambit of discovery has never been confined in the Prize Court as in municipal Courts. It has always been the practice of the Prize Court to insist on the fullest candour from claimants. Under the old practice the interrogatories, settled in the time of George III., were far more inquisitorial than would be permitted in ordinary litigation. The order asked for in this application is not unduly wide and should be allowed.

Le Quesne, for the claimant. At the time these goods were captured the Declaration of London, so far as the doctrine of continuous voyage was concerned, was in unimpaired force. Under art. 30 of the Declaration " absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transhipment or a subsequent transport by land." If more than that is entailed the doctrine of continuous voyage cannot be invoked. In the present case a great deal more than transhipment and land transit is entailed. The doctrine has no application unless the goods in their actual condition are on their way to the enemy. They must be taken in delicto : *The Imina* (1) ; and there must be a preconceived plan to send them to the enemy. In *The Polly* (2) it was held that the mere fact that goods were landed and duties paid was sufficient to break the continuity of the voyage.

[THE PRESIDENT. That was before the doctrine of continuous voyage had been evolved except as regards illegal trade.]

Even assuming an intention existed of ultimately sending the manufactured boots to Germany, there would still be no continuous transit, and the right of the Crown would be limited to seizing the boots—if they could intercept them—and not the leather destined for the neutral factory. The Crown, therefore, is not entitled to an order for discovery of the books and documents relating to the sale of boots from the factory, and apart from that the order claimed

(1) (1800) 3 C. Rob. 167 ; 1 Eng. P. C. 289.
(2) (1800) 2 C. Rob. 361, 369.

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is much too wide. [*The Springbok* (1), *The Peterhoff* (2), and *The Stephen Hart* (3) were also referred to.]

MacKinnon, K.C., in reply. Art. 30 of the Declaration of London does not bear the limited interpretation put upon it on behalf of the claimant. If the application involves an extension of the doctrine of continuous voyage it is only such an extension as in common sense it is necessary to give it.

Cur. adv. vult.

1917. March 5. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—The short question for decision upon this summons is whether the order for discovery should include documents relating to boots as well as to leather. The claim by the Crown in the proceedings is for the condemnation of a consignment of sole leather to the claimant, Ernst Aquist, on behalf of the Skofabriks Aktiebolaget Oscaria, of Orebro, in Sweden.

The objection for the claimant is that the leather cannot in any circumstances be seized as prize, if it was intended to be manufactured into boots in Sweden, although the boots were to be sent to the forces of the enemy. In general terms the contention was that no contraband goods can be seized by a belligerent, if upon a continuous voyage to the enemy, or to the enemy's armed forces, unless they were intended to be carried to an enemy destination in the precise condition in which they existed at the time of the seizure.

The case which the Crown proposes to put forward at the hearing is that the leather seized was either to be sent on to Germany or Austria, or that it was all to be used in Sweden in the manufacture of boots for the German or Austrian army. Evidence has been filed in support of the application which, prima facie, serves as a foundation for such a case. It deals with the shortage of leather in Germany and Austria, and with the imports of boots from Sweden into those countries, contrasting such imports before the war with those after the war; it states that non-commissioned officers of the German and Austrian armies have been stationed at Orebro—the centre of the boot trade in Sweden—for the purpose of examining and passing such boots before export into the enemy

(1) (1866) 5 Wall. 1. (2) (1866) 5 Wall. 28.
(3) (1863) Blatch. Pr. Cas. 387.

countries ; and it further states that the claimant company made a profit of 600 per cent. on their capital in the year 1915.

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If the leather could not be seized in any possible set of circumstances on the ground that it was going to be converted into boots in Sweden I should not order discovery of the claimant's books relating to the sale and export of boots.

Is the claimant's contention, that contraband goods cannot be seized on a continuous voyage, unless they were on their way to a final enemy destination in the same condition as they were at the time of seizure, sound ? As at present advised, I think it is quite unsound.

I shall give my reasons more in detail if the question arises for actual decision at the trial. I now have to deal with it as an interlocutory application.

The principles of general importance relating to continuous voyages were considered and discussed with some fulness in the cases of *The Kim* (1) and other vessels.

One of the tests applied was whether the goods imported were intended to become part of the common stock of the neutral country into which they were first brought. In my view the notion that leather, imported to a neutral country for the express purpose of being at once turned into boots for the enemy forces, becomes incorporated in the common stock of the neutral country, is illusory. Instances can be given and multiplied which appear to reduce to an absurdity the argument that if work is done in the neutral country upon goods which are intended ultimately for the enemy, that circumstance of necessity puts an end to their contraband character, and prevents their being confiscable according to the doctrine of continuous voyage.

It may be well to give a few instances, by way of illustration, relating both to conditional and absolute contraband.

Suppose coffee beans and cocoa beans were imported into a neutral country with the object of their being converted into coffee or cocoa to be sent on to the enemy, would the fact that the coffee beans were ground into coffee, or the cocoa beans were ground and mixed with sugar to make cocoa in the neutral country, be enough to render those goods immune from capture, if they would be

(1) [1915] P. 215.

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capturable as coffee or cocoa foodstuffs when afloat? Again, assume that cloth of an inappropriate hue, but intended for the enemy forces, was imported into a neutral country, and there dyed into the desired colour for the enemy forces; or that steel helmets were so imported, and there painted with the German army colour, or fitted with the regulation German army or regimental marks, would a belligerent lose the right to seize them at sea when and because they were not so dyed, painted, or fitted? To take a couple more instances. It is quite possible that the metal parts of rifles for the enemy army might be imported into a Scandinavian country in a complete state; and that the butt ends or timber parts were intended to be affixed in such country because timber was plentiful there, or for some other reason good or ostensible. Would the metal rifles be free from capture by a belligerent because they were to be so completed in the neutral country before being sent on to the enemy? If a field gun was imported, would it be protected from seizure because it would, in fact, be mounted upon its appropriate carriage before being exported from a neutral country to the enemy's front?

The Court could not give affirmative answers to such questions as these unless it cut itself adrift from the safe anchor of common sense.

I have said enough to show that, having regard to the case which the Crown will seek to establish at the trial, I think the order for discovery should extend to the documents relating to the boots as well as to the leather.

Accordingly I make the order as prayed in the summons, with the substitution of "August 1" for "January 1, 1913."

Leave to admit an appeal within one month; security 150l.

Solicitors for claimant: *Botterell & Roche.*

Solicitor for Procurator-General: *The Treasury Solicitor.*

E. C. T.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

1917
Jan. 29;
Feb. 21.

(In Prize.)

H.M. SUBMARINE VESSEL E 14.

Prize Court—Prize Bounty—Destruction of Enemy Transport—Enemy "armed ship"—Naval Prize Act, 1864 (27 & 28 *Vict. c.* 25), *s.* 42—*Order in Council of March* 2, 1915.

An enemy transport carrying 6000 troops armed with rifles and six field guns was torpedoed and sunk by a British submarine. There was no evidence whether the transport carried any armament, but she belonged to a class of fleet auxiliary vessels which were usually armed with a few six-pounder guns.

On a motion by the officers and crew of the submarine for prize bounty under an Order in Council of March 2, 1915, whereby, pursuant to the provisions of s. 42 of the Naval Prize Act, 1864, a sum calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement was distributable among such of the officers and crews of any of His Majesty's ships of war as were actually present at the taking or destroying of any "armed ship" of the enemy:—

Held, that an "armed ship" meant a fighting unit of the enemy's fleet commissioned and armed for offensive action in a naval engagement, and that as the applicants had not proved that the transport was such a ship the motion must be dismissed.

Motion for Prize Bounty.

The claimants, Commander E. Courtney Boyle, V.C., and the officers and ship's company of His Majesty's submarine *E* 14, sought a declaration that they were entitled to 31,375*l.* as prize bounty for the destruction of the Turkish transport *Gul Djeml* in the Sea of Marmora on May 10, 1915. They also claimed a declaration that they were entitled to 375*l.* in respect of the destruction of a Turkish gunboat, name unknown, on May 1, 1915.

By an Order in Council of March 2, 1915, His Majesty, in accordance with the provisions of s. 42 of the Naval Prize Act, 1864, declared his intention of granting as prize bounty for distribution among the officers and crews of any of his ships of war as were actually present at the taking or destroying of any "armed ship of any of His Majesty's enemies" a sum calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of

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the engagement. No question arose as to the gunboat, but the Procurator-General, on behalf of the Crown, contended that the *Gul Djeml*, which at the time of her destruction in addition to her crew of 200 had some 6000 troops on board and six field guns, was not an " armed ship " within the meaning of s. 42.

From an affidavit of Vice-Admiral Sir Arthur Limpus, who until the outbreak of war was head of the British naval mission attached to the Turkish Government, it appeared that the *Gul Djeml* was a fleet auxiliary designated as a troop transport. He " could not definitely recall her armament, but, in view of the general custom of arming all auxiliaries," in his opinion it was " certain that the *Gul Djeml* carried some light guns, probably six-pounders." According to the affidavit of Commander Boyle the submarine was fired at, but whether by the transport or by the convoying torpedo-boat destroyer he was unable to state.

Roche, K.C., and *Commander Maxwell Anderson, R.N.*, for the claimants. The *Gul Djeml* was a permanent constituent part of the Turkish navy. There is a strong presumption that she was armed with light guns, and the fact that there were several thousands of men on board armed with rifles rendered her a very effective and dangerous weapon against a submarine at short range. She had the right and the ability to act offensively, and therefore was an " armed ship " within the meaning of s. 42 of the Naval Prize Act, 1864 : see *Several Dutch Schuyts.* (1)

Pease, for the Procurator-General. A ship cannot be considered to be " armed " within the meaning of the section merely because she has men on board armed with rifles. An " armed ship " means a ship which carries guns for purposes of offence as part of her equipment. Under the old Prize Acts prize bounty was based on the number of guns carried by the enemy ship, and in more modern times the reason why the number of men on board has been taken as the basis, is that as the guns became more powerful fewer were carried but more men were required to work them, therefore the number of men on board affords a rough estimate of the ship's fighting capacity.

[It was also contended that, even assuming the transport was

(1) (1805) 6 C. Rob. 48.

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an " armed ship," the 6000 troops carried by her were not " persons on board " within the meaning of s. 42. In view of the decision on the larger question it became unnecessary to decide this point, and the arguments thereon are therefore omitted.]

Roche, K.C., replied.

Cur. adv. vult.

1917. Feb. 21. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—This motion for prize bounty is made on behalf of the commander, officers, and ship's company of His Majesty's submarine *E* 14. It concerns two enemy vessels sunk by the submarine in the Sea of Marmora in May, 1915. One was a Turkish gunboat and the other a large Turkish transport vessel. As to the former, I find that she had seventy-five men on board at the time of her destruction, and that the submarine was the only vessel present at the destruction. I therefore declare that the sum of 375*l.* is payable as prize bounty to the commander, officers, and crew of the submarine *E* 14.

As to the other vessel different and important questions arise. The first is whether she was an enemy armed ship in respect of which any prize bounty at all is payable. The other is whether, if bounty is payable, it is to be calculated according to the number of the crew of the ship or to the number of all the persons on board. The crew consisted of 200. If that were the determining factor the prize bounty would be 1000*l.* In addition to the crew the transport carried 6000 Turkish troops. If the number of persons on board were the determining factor the prize bounty would amount to 31,000*l.*

The first question to consider is the character of the destroyed ship, and whether it answers the description of an " armed ship " of the enemy within the meaning of s. 42 of the Naval Prize Act of 1864, which is the enactment now governing the grant of prize bounty. Counsel for the Crown contended that she was not.

It is interesting and not uninstructive to trace shortly the history and development of the granting of prize bounty, or head money as it was called in olden times. By two ordinances in the time of the Commonwealth (February 22 and April 17, 1649) it was ordained that a bounty should be given for sinking, firing, or destroying any

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of the revolted ships, or of any other fleet that should fight against the Commonwealth. If the ship destroyed was an admiral's the bounty was to be 20*l.* for each piece of ordnance on the ship; if a vice-admiral's 16*l.*; if a rear-admiral's 12*l.*; and if it was any other ship of war 10*l.* was to be allowed for each gun on the ship. By an Act passed in the fourth year of William and Mary a bounty of 10*l.* for every piece of ordnance in a taken, sunken, fired, or destroyed ship of war was given.

By the 8th section of the statute 6 Anne, c. 13, which dealt with prize, it was enacted that where a ship of war or privateer of the enemy was taken in action by any of His Majesty's ships of war, a sum should be paid to the officers and men who should have been actually on board the ship taking the enemy ship of 5*l.* for every man living on board the enemy ship so taken at the beginning of the engagement. There followed two Acts of the reign of George III. (43 Geo. 3, c. 160, and 45 Geo. 3, c. 72), by which it was enacted that a bounty of 5*l.* for every man who was living on board should be paid for the taking, sinking, burning, or otherwise destroying an armed ship of the enemy.

In the time of the Crimean war, by the 17 & 18 Vict. c. 18, it was provided that a bounty of 5*l.* should be given for every person who was living on board any enemy ship of war at the beginning of the engagement. Then came the provisions in s. 42 of the Naval Prize Act, 1864, already referred to, which is the Act now in force dealing with the matter, which gives bounty for destruction of armed ships of the enemy.

It will be observed that in former times the amount of prize bounty, or head money, was calculated on the number of guns that the enemy vessel carried, and, later, by the number of men on board. In olden days of course the number of guns carried was large in proportion to the number of men. In modern times the number of guns is very small in comparison, and in proportion to the men required for the equipment of the fighting vessels.

The character and description of the *Gul Djeml* were given in an affidavit of Commander Boyle, exhibiting a report of Lieutenant Slade, and by Lieutenant Commander Bagot, of the Intelligence Division of the Admiralty War Staff, who was called as a witness. It was afterwards supplemented by an affidavit of Vice-Admiral

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Sir Arthur Limpus. She appears to have been a fleet auxiliary designated as a troop transport, manned by naval ratings and commanded by officers of the Turkish navy. There was no evidence whether she was armed or how she was armed. But it was said that such auxiliaries were usually armed with about four light six-pounder guns. Reliance was also placed on the fact that when the vessel was destroyed she carried 6000 enemy troops with rifles, and six field guns (75mm. Krupps). No evidence was given as to whether these were placed in the holds or on deck.

Was she an "armed ship" within the meaning of the enactment referred to? That she was a fleet auxiliary does not constitute her an "armed ship." Besides troopships, there are other such auxiliaries —e.g., colliers, or oil ships, and hospital ships—which clearly do not answer that description. In my opinion, if it were proved that she carried a few light guns that would not constitute her an armed ship any more than a merchant vessel armed for self-defence. Nor would the fact that she carried troops armed with rifles and some field guns and other ammunition intended to be used after the landing of the troops.

Sect. 42 of the Prize Act refers to the number of men on board the enemy ship "at the beginning of the engagement." So, indeed, did the 8th section of the Act of Queen Anne. This does not mean that there must be an actual fight, for the enemy ship may be made to surrender by the presence of a superior force. But the words throw some light on the meaning which ought to be given to the expression "armed ship." It was decided in *Several Dutch Schuyts* (1) that the enemy vessel must be armed and commissioned to act offensively. In my view, an "armed ship," within the meaning of the section to be construed, is a fighting unit of the fleet, a ship commissioned and armed for the purpose of offensive action in a naval engagement. It has not been shown that the transport in question was such a ship.

The dazzling daring and intrepid courage of Commander Boyle and his comrades in their entrance and operations in the Sea of Marmora excited general wonder and admiration, and were recognized by His Majesty the King and by the heads of other Allied States. But in dealing with the application for prize money I must

(1) 6 C. Rob. 48.

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proceed in accordance with what I conceive to be the law which has to be administered; and for the reasons stated my decision is that this application for prize bounty fails, and must be disallowed. It is just possible, however, that at some future time further evidence may be procured as to the alleged armament of the vessel. I do not anticipate that it will. But in order to safeguard any possible rights of these brave officers and sailors, in disallowing the present application I do so without prejudice to any further application that they may be advised to make on any further evidence that may be forthcoming.

Solicitors for claimants: *Botterell & Roche.*
Solicitor for Procurator-General: *The Treasury Solicitor.*

E. C. T.

1917

Feb. 16.

PHILLIPS *v.* PHILLIPS.

Restitution of Conjugal Rights—Wife's Petition—Deed of Separation—Mutual Covenant not to sue for Restitution—No Appearance or Plea by Husband—Order made notwithstanding the Covenant.

Where a mutual covenant in a deed of separation gives rise to no question of public policy or of statutory bar to matrimonial proceedings, but is such that either party may take advantage of it, or both may set it aside, as for instance a mutual covenant not to sue for restitution of conjugal rights, the Court is not bound to take notice of the covenant in a suit seeking a remedy which may be contrary to the covenant, if the respondent in the suit does not appear or set up the covenant.

The Court granted a wife a decree for restitution of conjugal rights, in spite of the existence of a deed of separation disclosed to the Court containing a covenant not to sue for restitution of conjugal rights, which the respondent did not appear to set up.

Tress v. *Tress* (1887) 12 P. D. 128 followed.

Kennedy v. *Kennedy* [1907] P. 49 not followed.

THE petitioner was married to the respondent on April 28, 1904. In August, 1906, the parties separated and the wife went to live with her people. On January 13, 1908, the parties entered into a deed of separation which contained a covenant by the wife to pay the husband certain sums out of moneys settled by her, and a

mutual covenant that they should live separate and apart, and that neither of them should require or compel, or attempt to compel, the other to return to cohabitation by legal proceedings for restitution of conjugal rights or otherwise. The wife had regularly paid the moneys covenanted to be paid.

On July 26, 1910, the respondent wrote asking her to return. The petitioner refused at that time to do so. On October 28, 1916, she wrote to her husband the following letter :—

"My dear Hugh,—I have for some time been considering our position, and it seems to me that it is an impossible one and that we should come together again. The whole object of our separation has long since come to an end. I gave you your start in life, and whatever troubles existed between us I am willing to wipe out. I am writing to ask you to come back to me so that we can make a home together. Think it over carefully. It is for the good of both of us.

"Yours affectionately,

"Nellie Phillips."

The husband replied that he would never return to his wife.

The wife then filed this petition. The husband did not put in any answer or appear.

Priestley, K.C., and *W. O. Willis*, for the petitioner. There is no obligation upon the Court to regard the deed or the covenant unless they are pleaded : *Tress* v. *Tress*. (1) In *Beauclerk* v. *Beauclerk* (2) Lord St. Helier's judgment shows that he was of the same opinion as Lord Hannen upon this point. A covenant of this description is not on the same footing as the matrimonial offences dealt with in ss. 29, 30, and 31 of the Divorce Act, 1857 (20 & 21 Vict. c. 85), which the Court is expressly bound by statute to take notice of. The Court is not bound to take any notice of such a covenant unless the respondent pleads and relies on it.

In *Kennedy* v. *Kennedy* (3) Sir Gorell Barnes seems to have thought that *Tress* v. *Tress* (1) was decided on the ground that the husband had not performed his covenants in the deed, but this was

(1) 12 P. D. 128. (2) [1895] P. 220.
(3) [1907] P. 49.

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PHILLIPS v. PHILLIPS.

not so, and the two cases cannot stand together. [They also referred to *Hardie* v. *Hardie* (1) and *Balcombe* v. *Balcombe*. (2)]

Low J. In this case there seems to be some conflict of authority as to whether the Court is bound to notice a mutual covenant in a deed of separation that the parties will not sue for restitution of conjugal rights although the respondent neither appears nor sets up the deed. In *Tress* v. *Tress* (3) Lord Hannen was of opinion that in such circumstances it was not for the Court to set up such a defence for a husband who does not choose to do so. The deed, of course, might have disclosed connivance or collusion, or some fact that would be an absolute or discretionary bar. There is nothing of this kind in the present case, nor was there in *Tress* v. *Tress*. (3) In *Kennedy* v. *Kennedy* (4) Sir Gorell Barnes seems to have regarded the decision in *Tress* v. *Tress* (3) as having turned on the fact that the covenants in the deed had not been performed by the husband. I think Lord Hannen's decision was not on that point. *Kennedy* v. *Kennedy* (4) was an undefended case and was not argued; it does not appear to me possible to reconcile these two decisions, and I feel bound to follow Lord Hannen's decision in *Tress* v. *Tress*. (3)

In a covenant such as this, where no question of public policy or statutory bar arises, either party might take advantage of the covenant, or both together might set it aside. In such a case it is not for the Court to raise a defence not put forward by a party. The Court is entitled to assume that there are circumstances which prevent a party from availing himself of such a covenant. In the present case there is a letter of July 26, 1910, from the husband, the effect of which is that as long ago as that date he did not regard this deed as binding, and wished to act as if it were non-existent. I am not surprised, therefore, that he does not now appear to set it up.

The result is that on the facts of this case, and on general principles, I think the wife is entitled to her decree.

Solicitors for petitioner: *Chester & Co.*

(1) (1901) 70 L. J. (P. & M.) 29.
(2) [1908] P. 176.
(3) 12 P. D. 128.
(4) [1907] P. 49.

J. R. B.

In the Estate of C. R. PHIBBS, Deceased.

1917
Feb. 19.

Probate—Lost Will—Evidence—Contents—Attestation Clause—Execution—Attesting Witnesses not produced—No Evidence of their Identity—Presumption of due Execution.

Where a will proved to have existed has been lost or accidentally destroyed, and there is satisfactory evidence of the contents, and that the will appeared to be duly executed and attested, the Court will pronounce for the will according to its tenor as given in evidence, notwithstanding that the attesting witnesses cannot be found or identified.

Charles Radcliffe Phibbs died on April 21, 1916, a bachelor, leaving a nephew and two nieces his next of kin. He died in a nursing home in England domiciled in England, though he had lived most of his life in Dublin. His nephew H. J. Knox saw him the day before his death. The testator then asked H. J. Knox to see that a cash box in his possession was handed to Miss Blanche Smith after his death. Knox took the box to Miss Smith, and they together examined it and found therein a will which they both read carefully. The will was dated December 7, 1911, and was in the handwriting of the testator. It appointed Tweedy, a Dublin solicitor, executor. Knox and Miss Smith sent the will by registered letter post addressed to the executor in Dublin. The letter was not delivered to the executor, and was believed to have been destroyed in a fire at the Dublin Post Office during a civil commotion which occurred about that time.

As soon as the loss of the will was heard of Miss Blanche Smith wrote out from memory an epitome of its contents which was sworn to as accurate both by herself and Knox. The epitome stated that the testator left a legacy of 100*l.* to Miss Blanche Smith, a like legacy to another nephew who had in fact been killed in battle shortly before the testator's death, a small legacy to Mr. Tweedy, whom it appointed executor, and made Miss Blanche Smith residuary legatee. Both Knox and Miss Smith agreed that the will contained a full attestation clause and was attested by two witnesses, but neither of them could remember their names or addresses. The will appeared to have been duly executed. Numerous inquiries

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C. R. PHIBBS, IN THE ESTATE OF.

had been made, by advertisement and otherwise, but had failed to elicit the names of the witnesses. Two letters of the testator to the executor were found with the will, which in many respects confirmed the epitome and proved the testator's adherence to the will. Miss Smith had for fifteen years been acting as clerk in a solicitor's office in Lincoln's Inn.

The estate was under 200*l.* in value. The executor desired to renounce probate, and Miss Smith, as beneficiary, now applied for a grant of administration with the will as stated in the epitome annexed. The three next of kin supported the application.

J. H. Watts, for the motion. The presumption is in favour of due execution, and the evidence of the contents of the will is very satisfactory: *Sugden* v. *Lord St. Leonards* (1); *Burgoyne* v. *Showler*. (2)

[Low J. The distinction in the present case is that the attesting witnesses are not forthcoming. He also referred to *Harris* v. *Knight*. (3)]

Low J. In this case the Court is asked to allow probate to go of an epitome of a will alleged to have been lost under somewhat unusual circumstances. The case for the applicant is that in December, 1911, the deceased duly executed a will leaving the bulk of his small estate to the applicant, Miss Blanche Smith. The alleged testator died on April 21, 1916, and there is no doubt that amongst his papers there was found a will. The document was forwarded by registered letter post to Mr. Tweedy, a member of a firm of solicitors in Dublin. A day or two later Tweedy had not received the letter, and it is practically certain that it was destroyed by a fire which occurred at the General Post Office, Dublin, during the disturbance which took place at this period. The contents of the will were spoken to by Miss Blanche Smith, who had been for fifteen years a clerk to a firm of solicitors in Lincoln's Inn and by Mr. Knox. But the evidence as to the contents of the will does

(1) (1876) 1 P. D. 154. [Here it was admitted that the lost will was duly executed and attested (see at p. 175); it does not appear whether the attesting witnesses were named or identified.]

(2) (1844) 1 Rob. Ecc. 5; 3 Notes of Cases, 201.

(3) (1890) 15 P. D. 170.

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Low J.

not rest there, because among the testator's papers was found a letter to be sent to his executor after his death, and this letter speaks of the executorship and the contents of the will and agrees with the account given by the deponents. It is also proved by a person with special qualifications (Miss Smith) that the document contained a proper attestation clause; but no one can recollect the names and addresses of the attesting witnesses, although both Miss Smith and Mr. Knox swear that the document was attested by two witnesses.

This is a difficulty which, so far as I know from the cases cited, has never arisen before. In all these cases the names, or at all events the name of one, of the attesting witnesses have been known, and their testimony has been to some extent available. In the present case there is no evidence as to who the attesting witnesses may have been. It is possible that if the case were contested, as *Harris* v. *Knight* (1) was, there might be some difficulty. In the present case the three next of kin assent to a grant in the terms sworn to by the applicant. I do not wish, however, to limit the expression of my opinion to a case in which the Court is assisted by this assent. I have no doubt at all about the facts as proved by the applicant having special knowledge, supported by the evidence of another and uninterested witness, and further supported by the letters in the handwriting of the testator. I think therefore that the Court is justified in holding that the testator did duly execute his will and in the terms set out in the epitome, and that the Court ought to pronounce for the paper, even if it had not been assented to, and to grant probate in the terms of the notice of motion.

Solicitors: *Ingpen & Armitage.*

(1) 15 P. D. 170.

J. R. B.

1917
March 9.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

THE SAN ONOFRE.

[1916 A. 472.]

Admiralty—Salvage—Appraisement—Value of Salved Ship—Basis of Valuation—Market Value—Disadvantageous Charter—Value to Owners.

The Admiralty Marshal appraised a salved steamship at the sum of 369,841*l.* On an application to vary or set aside the appraisement on the ground that the ship had been appraised at her market value instead of at her value to her owners, which, owing to the fact that she had been chartered to time charterers at a low rate of hire in 1914 for a period which did not expire until 1930, was less than 160,000*l.* :—

Held, that for purposes of appraisement of a salved vessel contractual arrangements between the owners and charterers are immaterial, and that the Marshal's valuation was properly arrived at and was based on the right principle.

The general rule is that an appraisement by the Marshal is conclusive, and it is only in very exceptional cases that an application to vary or set aside the appraisement will be allowed.

ACTION OF SALVAGE.

The plaintiffs were the owners, master, and crew of the steamship *Ashtabula*. The defendants were the owners of the steamship *San Onofre*.

The action was brought to recover salvage remuneration for standing by, steering, and towing the *San Onofre*, a tank steamship of 9717 tons gross, over a distance of 1280 miles in very bad weather, when that vessel had helplessly broken down in the North Atlantic in the course of a voyage from Rosyth to Tampico in ballast, owing to the oil fuel, by which she was propelled, having coagulated. The services lasted nineteen days, and for the latter portion of the time the *Ashtabula* was assisted by the steamship *San Gregorio*, a vessel belonging to the same owners as the *San Onofre*.

The value of the *Ashtabula*, a steel screw tank steamship of 7025 tons gross, was 300,000*l.*; her cargo of oil in bulk was valued at 18,577*l.*, and the freight 52,962*l.*

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The value of the *San Onofre* was sworn by the defendants at 160,000*l.*, but the plaintiffs, not being satisfied with this valuation, had her appraised by the Marshal, whose valuer appraised her at 369,841*l.*

At the trial counsel for the plaintiffs contended that the Marshal's valuation was made on a wrong basis, and applied that it should be varied or set aside and a fresh appraisement made. By consent the application was treated as an independent motion.

In support of the defendants' valuation of 160,000*l.* an affidavit of the manager of the Eagle Oil Transport Company, Limited, the owners of the *San Onofre*, had been filed. It stated that the vessel was built in 1914 with the intention of chartering her to the Compania Mexicana de Petroleo El Aguila, S.A. She was delivered to her owners on September 14, 1914, the contract price being 156,000*l.* There were certain extras, and the total cost of the vessel was 162,891*l.* As soon as the *San Onofre* was delivered to her owners she was handed over to the time charterers under a charterparty which continued in force until December, 1930. The rate of hire provided by the charterparty was fixed as being "a fair return upon the capital to be sunk in the ship having regard to the obligations imposed upon the owners by the charterparty." The vessel stood in the books of the owners at the cost price less 10,623*l.* for depreciation written off on December 31, 1915, at the rate of 5 per cent. per annum, making the value at that date 152,268*l.* The services in question terminated on March 18, 1916, and at that time the vessel had sustained damage to the hull and had also burnt all available woodwork, which cost 8000*l.* to repair. In view of these facts the deponent said that the value of the *San Onofre* to her owners at the time the services were rendered was less than 160,000*l.*, the value put forward for the purposes of the action.

In answer to a letter from the defendants' solicitors to the Admiralty Marshal requesting that in view of the fact that the *San Onofre* was under charter until 1930 at an unremunerative rate as compared with the existing rates the valuation should be reconsidered, the Marshal replied that he was not prepared to reconsider the figures as given in the appraisement, which represented "the market value of the vessel as a going concern at the date of the completion of the salvage services."

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At the hearing it was objected on behalf of the plaintiffs that the Marshal's appraisement was conclusive, and that therefore this letter stating the basis of the valuation could not be put in evidence by the defendants, but after hearing arguments (as set out below) the President allowed the letter to be read as if it were on affidavit.

Dawson Miller, K.C., and *Noad*, for the defendants. In arriving at so large a value as 369,841*l.* the valuer appointed by the Marshal clearly must have appraised the *San Onofre* on the market value of a vessel of her description free from all incumbrances. But if sold in the market subject to the charterparty she would not fetch half that sum, for the profit to her owners under the charterparty worked out at under 24,000*l.* per annum. The valuer therefore should have taken the value of the vessel to her owners from a business point of view. The basis of valuation is the value of the vessel in her damaged condition to her owners: *The Harmonides* (1); *The Hohenzollern.* (2)

[THE PRESIDENT. Have you the right to go behind the appraisement?]

An appraisement is not conclusive: see *The Oscar* (3) and *The Hohenzollern.* (2) The vessel has been appraised upon a wrong basis, and the Court should give instructions for a fresh appraisement to be made.

Laing, K.C., and *Dumas*, for the plaintiffs. The appraisement is conclusive. Except in cases of fraud or misconduct, or unless, e.g., it could be shown that the valuer by some mistake had valued the wrong vessel, an appraisement will not be reopened. *The Hohenzollern* (2) was altogether an exceptional case, and is no authority for the proposition that under ordinary circumstances an appraisement can be reopened.

[THE PRESIDENT referred to *The R. M. Mills* (4), *The Cargo ex Venus* (5), and *The Georg.* (6)]

The value of the ship, qua the salvors, is not affected by any contractual obligations into which the shipowners may have

(1) [1903] P. 1.
(2) [1906] P. 339.
(3) (1829) 2 Hagg. Adm. 257.
(4) (1860) 3 L. T. 513.
(5) (1866) L. R. 1 A. & E. 50.
(6) [1894] P. 330.

entered. The property salved is the whole res and not a fraction of it. It could not be suggested that in the case of a mortgaged vessel the owner would only have to give bail to the amount of the equity of redemption; and by entering into an arrangement with time charterers whereby the vessel is hired for a small, or possibly a nominal, sum the shipowner cannot so reduce the value of his vessel as against salvors. They are entitled to be paid salvage on the real value, that is the market value, of the property salved. The appraisement, therefore, was correctly made and should not be reopened.

THE PRESIDENT (SIR SAMUEL EVANS). In this case the salved ship was valued by her owners at the sum of 160,000*l*. The salvors were not satisfied with that valuation, and obtained an appraisement by the Marshal of the Court. The result of the appraisement is that the value of the ship is stated to be more than double the figure given by the owners.

I allowed counsel for the defendants to make an application in this case as if he were moving the Court on proper materials to vary or set aside the appraisement of the Marshal. It is only in very exceptional cases that this can be done; because, ordinarily speaking, where there has been an appraisement by the Marshal, the appraisement is conclusive. I will not say that there may not be instances where by reason of obvious mistake or fraud or some other strong ground an appraisement may be questioned and reopened.

The ground of this application is that the *San Onofre* cannot be regarded as an ordinary vessel at all, but must be looked at as a wholly exceptional vessel, having regard to the contractual obligations which had been entered into between the shipowners and the charterers. In no case, so far as I am aware, have the charters of a vessel been taken into account in assessing the value of a salved ship in salvage proceedings; and I think it would be very undesirable from all points of view if there should be introduced into valuations in salvage cases any element of that kind, which would make a reference to the Registrar and merchants necessary in order to ascertain the value of the salved ship.

The ship is salved, and may be arrested as she is, as the salvors are entitled to arrest the res. If bail is not given the ship may be

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sold. She would not be sold subject to charterparties, but as she existed to any one who wanted to buy a ship of her description.

In this case an undertaking was given to put in bail in ordinary form; and the writ as issued was directed to the owners of the *San Onofre*, her cargo and freight, and all persons interested in the vessel. The Court has nothing to do with the relationship between the shipowners and the charterers; nor in my opinion have the salvors anything to do with any such question.

In my judgment the valuation procured by the Marshal to value the vessel on his behalf was properly arrived at, and was based on the right principle. The value of the ship for the purposes of these proceedings, therefore, must be taken to be 369,841*l.* 18*s.* 3*d.*

The hearing of the salvage suit was then proceeded with, and in the result the learned PRESIDENT (who was assisted by two of the Elder Brethren of the Trinity House) awarded the plaintiffs the sum of 36,550*l.*, apportioned as follows:—32,000*l.* to the owners, 1000*l.* to the master, and 3550*l.* to the crew, forty in number, according to their rating. His Lordship added that in his experience it was the largest salvage award which had ever been made; and it would have been larger but for the fact that, although the *Ashtabula* rendered excellent service in going to the *San Onofre's* assistance, in standing by, and in steering, she could not have towed the vessel into a safe position without the assistance of the *San Gregorio* or some other vessel.

Solicitors for plaintiffs: *Thomas Cooper & Co.*
Solicitors for defendants: *William A. Crump & Son.*

E. C. T.

[IN THE ADMIRALTY COURT AND IN THE COURT OF APPEAL.]

P. D.
1917
Jan. 16, 17; *Feb.* 2.
C. A.
March 5, 6.

THE PHILADELPHIA.

[1916, No. 106.]

Admiralty—Collision—Total Loss—Measure of Damage—Freight prepaid —Value at Time of Loss or End of Voyage—Prospective Profits.

The measure of damage in the case of the total loss by collision of a vessel under charter is the value of the vessel at the time of her loss, plus the proper sum for freights or profits at the end of the voyages fixed by her existing charters, subject to proper deduction for contingencies and wear and tear.

The Racine [1906] P. 273 explained.

MOTION in objection to the report of the Liverpool district registrar on a reference to assess damages.

The claim in the reference arose out of a collision between the plaintiffs' sailing vessel *Ben Lee* and the defendants' steamship *Philadelphia* in Carnarvon Bay on January 29, 1916, which resulted in the total loss of the *Ben Lee* with her cargo and effects. At the time of the collision the *Ben Lee* was outward bound from Liverpool with a general cargo for Sydney and Boston. The defendants admitted liability for the damages caused by the collision, subject to a reference to the district registrar and merchants.

The district registrar reported that the claim in respect of the loss of the ship as originally filed consisted of two items only, namely, (1.) value of the *Ben Lee*, 22,500*l.*; (2.) cost of outfits, &c., and stores, 4323*l.* 1*s.* 7*d.* The freight for the outward voyage had been prepaid, and there was therefore no claim for loss of freight.

Separate claims were filed in respect of the loss of the cargo and the crew's effects.

On the reference it appeared that the value of the *Ben Lee* had been assessed by a nautical valuer at 22,500*l.* as at a date shortly prior to the loss, and this value was agreed by the defendants' solicitors. The district registrar was of opinion, however, that the value should, under the decision of the Court of Appeal in *The Racine* (1), have been ascertained as at the end of the voyage. It

(1) [1906] P. 273.

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was agreed that this voyage would have occupied 105 days, and he gave the plaintiffs leave to produce evidence showing the presumptive value of the *Ben Lee* had she arrived at Sydney, and adjourned the reference for that purpose.

The valuer who had previously valued the *Ben Lee* at 22,500*l.* as at the date of loss was instructed to revalue her on the basis of her assumed arrival at Sydney on May 1 (105 days after leaving Liverpool), and he assessed the value on this basis at the sum of 29,375*l.*

With the consent of the defendants' solicitors an amended claim was filed in which 29,375*l.* was substituted (in an alternative form) for 22,500*l.* as the value of the vessel.

On the adjourned reference no objection was raised to the increase in the amount of the valuation of the vessel, but it was contended that the plaintiffs had agreed the figure of 22,500*l.*, and that they were not entitled to go outside that agreement. As it was admitted that both sides had agreed that 22,500*l.* represented the value of the vessel at the date of the loss, the district registrar was of opinion that the plaintiffs were not precluded from claiming the enhanced value of the vessel as on the completion of her voyage, and he allowed the claim for the amended value.

The defendants moved that the report of the district registrar, so far as it related to the value of the *Ben Lee*, be rejected or varied.

Feb. 2. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—An important question is raised upon this motion, namely, at what date is the value of a ship, which has become a total loss in a collision, to be taken in assessing the damages payable by the owners of the vessel in fault.

The collision took place in January, 1916, in Carnarvon Bay, between the sailing vessel *Ben Lee* and the steamship *Philadelphia*. The *Ben Lee* was sunk. The owners of the *Philadelphia* admitted liability. The *Ben Lee* was under charter with a general cargo for Melbourne and Sydney. The freight had been prepaid. It was assumed that she would have arrived at Sydney on May 1, 1916. The value of the vessel at the time of the loss had been agreed between the parties at 22,500*l.* At the reference the district registrar raised the point that the value of the vessel should be taken as at the time of her assumed arrival at the end of her voyage

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at Sydney. Amendments were made in the claim accordingly. The value as on May 1 was fixed at 29,375*l.* That is to say, in the three months between the collision and May 1 the value of the sailing vessel had increased by 6875*l.*, or more than 30 per cent.

The district registrar allowed the increased value. He based this upon *The Racine* (1), which he thought decided that the value of the vessel must be ascertained as at the end of the voyage. The application on the motion is that the sum of 29,375*l.* be reduced to 22,500*l.*

It is necessary shortly to examine what the Admiralty rule in such a case has been, and to ascertain what the exact decision in *The Racine* (1) was. The Court of Appeal in *The Racine* (1) approved of the earlier decision of Sir F. Jeune P. in *The Kate.* (2) The authorities are carefully collected in the latter case. It was pointed out that Dr. Lushington had decided in *The Columbus* (3) and in *The Clyde* (4) that the value of the vessel was to be taken at the time of the loss. That learned judge stated the same rule in *The Iron-Master.* (5)

Side by side with the decisions of Dr. Lushington, the opinions of Sir Robert Phillimore were also considered in *The Kate* (2), with reference especially to his judgment in *The Northumbria.* (6) Collating the views which had been expressed by those two learned judges, Sir F. Jeune deals with them thus: "The difference between the views of the practice of the Court of Admiralty taken by Dr. Lushington and Sir Robert Phillimore, both of course very high authorities on such a matter, is perhaps more apparent than real. Dr. Lushington indicates that the value of the vessel is to be taken at the time of the collision, which does not, as I have above suggested, exclude a fact such as the existence of a profitable charter from being allowed to enhance the value of the vessel at that time. Sir Robert Phillimore states that the value should be taken as at the end of the voyage, and therefore lets in freight or interest as an additional compensation. The result of the two calculations in figures should be practically identical."

The general principle to which the Court strives to give effect is

(1) [1906] P. 273.
(2) [1899] P. 165, 168, 174.
(3) (1849) 3 W. Rob. 158.
(4) (1856) Swa. 23.
(5) (1859) Swa. 441.
(6) (1869) L. R. 3 A. & E. 6.

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restitutio in integrum, subject to the limitation that the damages must not be too remote in law. Upon this Sir F. Jeune adds for himself: "It may be nothing more than a question of statement of figures whether the owner of a vessel, lost when under a profitable charterparty, is recouped this loss by receiving her value at the conclusion of her voyage plus the profits of her charterparty, or by receiving her value at the time of collision, such value being enhanced by the fact that the ship at the time was under a profitable charterparty. But, unless in one or other of these ways the owner gets the benefit of the profitable engagement of his ship, he obviously fails to realize a restitutio in integrum."

The question which arose for decision in *The Kate* (1) was simply whether the value of the lost vessel was to be fixed at the time of the collision as if she were a free vessel, without reference to the benefit which might accrue under her then existing contractual obligations, or whether the profits which might be the result of the performance of her existing charter were to be taken into account as an element in her value. The decision was that the latter was the correct rule of assessment.

The learned President also expressed the view that nothing appeared to have been decided by Dr. Lushington in the cases referred to which would exclude a claim for "enhanced value of a vessel at the time of her loss by reason of a profitable engagement which had been secured for her." In order "to remove the claim as far as possible from the region of speculation" the calculation would be made as at the end of the voyage. This does not mean that the value of the vessel per se at a date removed by a substantial period from the time of the collision, due to the rise of the commercial market in ships, should determine the amount of the damages, but that profits of the voyage which would have been completed (after making proper deductions for wear and tear and contingencies) should be added to the value of the vessel itself as at the date of the loss.

The case of *The Racine* (2) does not differ in principle. It only extended the application of the rule to a succession of existing charterparties. Fletcher Moulton L.J. explains the reason and method of the calculation of damages. He says: "By adopting

(1) [1899] P. 165, 168, 174. (2) [1906] P. 273, 280.

this plan there is no change in what you are calculating—you are calculating the pecuniary difference made to the plaintiff by the collision—but you calculate it by considering the position of the plaintiff at a date at which you can get the requisite data more easily, and you allow interest from that date only. The date taken is the conclusion of the voyage. Setting aside other risks, the plaintiff, but for the collision, would at the end of the voyage have been in possession of his ship (diminished in value by the wear and tear of that voyage), and would have been in possession of the freight. Neither of these things, however, were certainties. There was the risk of loss during the subsequent part of the voyage, and these two sums must be discounted according to that risk. This is an easy task inasmuch as such risks are the ordinary subject of insurance, and having allowed for these other risks, you get a sum of money the possession of which would be the equivalent of the plaintiff's position had the collision not taken place."

There is nothing in the judgments of the Lords Justices to justify the taking of the increased or inflated value of a vessel itself at a date subsequent to the collision as the basis of the damages.

I have examined the record of *The Racine*. (1) The valuation of the vessel was given as at the date of collision by all the witnesses for the plaintiffs and the defendants, and was fixed by the registrar and merchants at a sum between the maximum and minimum valuations. No evidence was given of the value of the lost vessel as at the end of the charter voyages. Other sums were added for freights after deductions for contingencies, &c.

Before concluding, I may mention that the rule adopted in the American Courts is correctly stated by Mr. Sedgwick in his work The Measure of Damages, s. 594, 9th ed., p. 1144, as follows: "If the injured vessel is a total loss her market value at the time will be the criterion of damages." In support of this, reference may be made to *The New Jersey* (2), *The Baltimore* (3), and *The Umbria*. (4)

In my opinion the right rule for arriving at the damages in a case of total loss of a vessel under charter is to value the ship at the time of its destruction or loss, and to add the proper sum for

(1) [1906] P. 273, 280.

(2) (1846) Olcott's Admiralty Reports, 444, 446.

(3) (1869) 8 Wall. 377, 386.

(4) (1896) 166 U. S. 404, 421, 422.

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freight or profits at the end of the voyages fixed by her existing charters, subject to proper deductions for contingencies and wear and tear.

I reject the allowance of the increased value between January and May 1 as part of the damages, and the item of 29,375*l.* must be reduced to 22,500*l.*

The district registrar's report will be varied accordingly.

The plaintiffs must pay the costs of the appeal.

Leave to appeal.

March 5, 6. *Laing, K.C.*, and *A. Hyslop Maxwell*, for the appellants. The Court of Appeal distinctly ruled in *The Racine* (1), which approved the judgment of Jeune P. in *The Kate* (2), that the period to be regarded was the end of the voyage : see in particular the observations of Fletcher Moulton L.J. As long ago as 1869 Sir Robert Phillimore in *The Northumbria* (3) had similarly decided : see also *The Amalia*. (4) Prepayment of freight cannot affect the principle. It makes no difference to the owners of the wrong-doing vessel whether freight has been prepaid or not ; if prepaid, they have to pay it back to the cargo owners in the enhanced value of the cargo ; if unpaid, it is part of the shipowner's damages. Although the freight was prepaid, the *Ben Lee* was earning the freight when she was sunk. The value of the vessel means the market value, and there is no market value for a sailing vessel in mid-ocean which cannot be delivered for three months. The market value cannot be ascertained until the seller is in a position to deliver the vessel, which would not be until the end of the voyage. In the case of cargo the value is taken as being the market value at the port of destination, or, if there is no market value, the invoiced value plus an allowance for profit : *Ströms Bruks Aktie Bolag* v. *John & Peter Hutchison*. (5) If it be right, therefore, in the present case to take the value of the cargo at the port of destination on May 1, it should follow that the value of the ship should be taken on that date also. There is a difference between the admiralty and the common law

(1) [1906] P. 273, 280.
(2) [1899] P. 165.
(3) L. R. 3 A. & E. 6.
(4) (1864) 34 L. J. (Adm.) 21.
(5) [1905] A. C. 515.

rule as to assessment of damages. The common law does not go quite as far as restitutio in integrum. In admiralty the shipowner must be put so far as possible in the same financial position as if no collision had happened. It is not disputed by the respondents that freights were rapidly rising, and that had the *Ben Lee* arrived at Sydney her market value there on May 1 would have been 29,375*l*. Equally, if freights had been falling it is possible that her value at the port of destination would have been less than at the time of the collision. But she was certain of a homeward freight from Sydney, for before May 1 the Government were requisitioning all British vessels arriving at Sydney and loading them with grain for the United Kingdom. Damages to the extent of her enhanced value therefore flow directly and naturally from the wrongful act, and accordingly are not too remote : see the judgment of Lord Herschell in *The Argentino* (1) ; see also *The Empress of Britain* (2), where several successive charters were taken into account. [*The City of Rome* (3) was also referred to.]

Aspinall, *K.C.*, and *Stuart Brown*, for the respondents. There is no rule in *The Racine* (4) that the market value of the vessel is to be taken as at the end of the voyage, and no such practice has ever been acted upon in the Admiralty Registry in London. If a shipowner is to be given the profit he would have made out of the voyage under a charter, regard must no doubt be had to the end of the voyage, but only in order that the proper deductions may be made for wear and tear. Full effect can be given to the decision in *The Racine* (4) by giving the shipowner whose ship is under contract the value of the ship at the time of her loss, plus the value of the charter, less deductions for wear and tear and the expenses of the voyage.

[They were stopped.]

SWINFEN EADY L.J. [After reviewing the facts already set out, the learned Lord Justice continued :] It has been contended before us that there is an established rule of the Admiralty Court that in the case of the total loss of a vessel under charter the ship is to be valued as on the probable date on which she would have arrived at

(1) (1889) 14 App. Cas. 519, 522.
(2) (1913) 29 Times L. R. 423.
(3) (1887) 8 Asp. M. L. C. 542, n.
(4) [1906] P. 273.

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her port of destination, and there the market, or probable market, value of the ship at that date is to be taken.

There is no authority whatever for the contention put forward by the appellants, and it would be contrary to all principle so to decide. In the judgment of the learned President he refers to the measure of damages given in Mr. Sedgwick's book : " If the injured vessel is a total loss her market value at the time "—that is at the time of her loss—" will be the criterion of damages." Now cases have been cited which established that where a ship, the subject of a charter, is a total loss by reason of a collision, the shipowner is entitled to recover the value of the ship plus the value of the charter. It is laid down that the owner is entitled, so far as money can effect it, to restitutio in integrum, that he is entitled to be placed in the same position, so far as money can place him, as if the collision had not taken place ; and the result of that rule so laid down in general terms is that where the ship is under a contractual engagement the shipowner is entitled to say " What I have lost is the value of my ship with her engagements." If the engagement is profitable, it would enhance the value of the ship ; if, on the other hand, it is an unprofitable engagement, possibly it might diminish her value.

Now distinction is drawn between a ship with a definite engagement and a ship without any engagement, but with a chance or a probability of earning profit. Several instances have arisen with regard to fishing vessels. In the cases to which our attention has been drawn it has been held that the owner is not entitled to recover, in addition to the value of the ship, the loss of probable profit that he would have made if the vessel had been able to continue fishing.

The rule was considered in the case of *The Argentino*. (1) The members of the Court of Appeal differed, and the case went to the House of Lords. Bowen L.J. stated the rule that was approved and adopted in the House of Lords, which was contrary to the view that Lord Esher had expressed. Bowen L.J. said : " A ship is a thing by the use of which money may be ordinarily earned, and the only question in the case of a collision seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and

(1) (1888) 13 P. D. 61, 191 ; 14 App. Cas. 519.

speculative and special profits) the shipowner, but for the accident, would have earned by the use of her. It is on this principle alone that it is habitual to allow in ordinary cases damages for the time during which the vessel is laid up under repair in addition to the cost of the repairs themselves. But this is merely an application of the general principle, and is not the measure in all cases of the loss. It might conceivably, upon the one hand, be the fact that the damaged ship would not and could not have earned anything at all while laid up for repairs, though such a case must necessarily be exceptional. In such circumstances nothing ought to be allowed for demurrage. Upon the other hand the direct consequence of the accident might be that the injured vessel was necessarily thrown out of her employment, not merely during the period of repair, but for a longer period still. In such a case the loss could not properly be measured by the time taken in repairs alone." (1)

Now it will be observed that Bowen L.J. there in terms states that the element of uncertain and speculative and special profit is to be excluded. In the House of Lords Lord Herschell in his speech said: "It is admitted that there is no special rule of the Admiralty Court governing the question, and that the law there administered in relation to such a matter is the same as prevails at common law." (2) Then he added this: "It does not appear to me to be out of the ordinary course of things that a steamship, whilst prosecuting her voyage, should have secured employment for another adventure. And if at the time of a collision the damaged vessel had obtained such an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure appear to me to be the direct and natural consequence of the collision." (3) It is therefore established that the owner of the ship is entitled to recover what may be put shortly as the value of the charter.

How is the value of the charter to be arrived at? It was urged, first, that it was unnecessary that there should be any charter or definite contract. In my opinion that contention is wrong. In order to bring a case within this rule there must be an employment contracted for; and it was by reason of the absence of any contract

(1) 13 P. D. 191, 201. (2) 14 App. Cas. 519, 522.
(3) 14 App. Cas. 519, 523.

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for employment that cases like *The Columbus* (1), *The City of Rome* (2), and other similar cases were decided. In *The City of Rome* (2) Lord Hannen refused to allow a claim for the value of the fish which it was alleged would have been taken. An attempt was made there to introduce the uncertain and speculative profit. Where, on the other hand, there is a definite contract for the employment of the vessel the charter is to be taken into account, and that whether there is one or more consecutive charters.

Then it was said that in working out that value, in order to give effect to the rule and to include the value of the charter, the value of the ship must be taken at her port of arrival. In a sense that is true, and that phrase has been used in various cases; but in my opinion what is meant by that is that the value of the ship is to be taken at the end of the voyage in the sense that if the shipowner is to be given the profit that would have been earned by the current charter the elements that would have to be considered before the profit was ascertained must be taken into account. The first thing which would have to be taken into account would be the diminished value of the ship by reason of the wear and tear which arises when the value of the ship at the end of the voyage is ascertained. It does not mean the speculative value of what the ship would probably then fetch in the market if she were sold having regard to the demand for ships and their greatly increased price. Fletcher Moulton L.J., in *The Racine* (3) which was relied on, puts the matter in this way: "The date taken is the conclusion of the voyage. Setting aside other risks, the plaintiff, but for the collision, would at the end of the voyage have been in possession of the ship (diminished in value by the wear and tear of that voyage), and would have been in possession of the freight." In other words, in order to find the value of the charter you must see what the shipowner would have had to lose or provide in order to gain his freight. There would be the wages of the crew on the outward voyage; in the case of a steamship there would be the bunker coal, and in the case of every vessel, whether a steamship or sailing ship, there would be an allowance for the wear and tear caused by the voyage and for other contingencies. In my opinion, both in *The Kate* (4) and in *The*

(1) 3 W. Rob. 158.
(2) 8 Asp. M. L. C. 542, n.
(3) [1906] P. 273, 280.
(4) [1899] P. 165.

Racine (1) it was the amount of the deduction from freight that has to be made for the wear and tear of the voyage that was in the mind of the Court when the expression was used as to taking the value at the end of the voyage ; in every case it means the diminished value by reason of having to make the proper allowance for wear and tear of the voyage.

Under these circumstances I am of opinion that the judgment of the learned President below was right when he said that the right rule for arriving at the damages in the case of the total loss of a vessel under charter was to value the ship at the time of its destruction or loss, and to add to this the proper sum for freight or profits at the end of the voyages fixed by her existing charters, subject to proper deductions for contingencies and wear and tear. It is in that way that the value of the thing lost to the shipowner is arrived at ; it is the value of the ship with her engagement which has to be valued ; and that, I think, is really the view of the various judges before whom the question has previously come. It was that view which Lord St. Helier, then Sir Francis Jeune, expressed in *The Kate* (2) when he said that the difference between the views of Dr. Lushington and Sir Robert Phillimore was more apparent than real. When Dr. Lushington indicated that the value of the vessel is to be taken at the time of the collision it does not exclude a cause such as the existence of a valuable charter from being allowed to increase the value of the vessel at that time ; Sir Robert Phillimore said that the value should be taken as at the end of the voyage and therefore lets in any profit or interest as additional compensation, and the result of the two calculations in figures should be practically identical. Figures can only be practically identical if they are worked out on the footing that I have suggested. If a speculative increase or decrease in the market value of the vessel at some place long after the collision has been taken into account, practically in almost every case the figures would be very different.

For these reasons I am of opinion that the judgment of the President is right and the appeal should be dismissed.

BANKES L.J. I agree. I think that the view taken by the President of the authorities was quite right, and that this appeal

(1) [1906] P. 273, 280. (2) [1899] P. 165.

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fails. I think when the cases are looked into it will be found that there is no authority for the proposition put forward by the appellants. It is quite true that in a number of cases, when dealing with the question of the damages to which the owner of a vessel which had been sunk in a collision was entitled, the learned judges have spoken of the rule of the Admiralty Court that the damages were the value of the ship at the end of the voyage; but when those authorities are looked into and the facts are ascertained it seems plain to me that the expression has not been used in the sense contended for by counsel for the appellants, in the sense, that is to say, of the market value of the vessel if put up for sale at the end of her voyage. I think it will be found that the expression has never been used to include anything more than the value of the vessel at the time of the collision, plus any profit which she was in the act of earning at that time, and plus any profit which, under a contract or contracts existing at that time, she was entitled to earn, after discounting, of course, those profits by an amount commensurate with the risk incurred in earning them.

Not only, in my opinion, is there no authority for the proposition, but it seems to me opposed to the first principles upon which the measure of damages in the case of collision should be ascertained, and I think that Fletcher Moulton L.J. in the case of *The Racine* (1) put the matter on its right footing when he said that the rule of the Admiralty Court, of which so much has been said, was really a rule of convenience for accurately arriving at the amount of damage which the owner of a vessel has sustained rather than a rule of principle by which those damages should in fact be arrived at.

On those grounds I think that the appeal fails.

LAWRENCE J. I am of the same opinion.

I think the proposition stated by the learned President at the end of his judgment correctly expresses the rule of law in this case, and I do not think it is necessary for me to say anything; it has been read once, and it accurately puts the proper rule. Mr. Laing in his very able argument used the word "value"—of course it was his sheet anchor—as the market value at the end of the voyage, but it was really using the word "value" in a different

(1) [1906] P. 273, 280.

sense to that in which the judges used it who delivered the judgments to which we have been referred. The reason that the word "value" was taken as at the end of the voyage where the ship was under charter was in order to get at the true amount that had to be credited for freight. The freight had to be taken into consideration as a credit, but it was not a gross credit, because a number of deductions had to be made for the wages of the crew, wear and tear of the ship and tackle and other things unnecessary to enumerate, and in order to bring those into account the value at the end of the voyage was spoken of, as though they were a debit against the ship, whereas really they probably ought to have been put as a debit against freight. I do not agree at all that any such addition can be made if the ship is not under charter or engagement of some kind. The charter or engagement resembles the case of a growing crop; if a growing crop is destroyed, its value has to be taken into consideration when it yields fruit and after deducting the expenses of gathering it; in that way the true amount of damages would be ascertained. But in this particular case it would result in an entire refusal of justice because the freight has already been paid, and in assessing the damages due to the shipowner regard should not be had to the end of the voyage at all; it would be making the defendants pay, or probably taking the first step towards making them pay, twice over, because when they have to settle with the cargo owner he would bring that freight into account as a credit; so that the proper assessment of the damage sustained would be completely destroyed. The case could not have been better put than it was by Mr. Laing, but I do not think any one can say that the rule is other than has been expressed by Swinfen Eady L.J.

Appeal dismissed.

Solicitors for plaintiffs (appellants): *Weightman, Pedder & Co.*
Solicitors for defendants (respondents): *Hill, Dickinson & Co.*

E. C. T.

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March 2, 8, 9, 14, 19.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

(In Prize.)

THE KRONPRINSESSAN MARGARETA.

THE THAI.

[1915, Nos. 600 and 728.]

Prize Court—Contraband—Cargoes partly Contraband and partly "Innocent"—Doctrine of Infection—Post-bellum Shipments—Transfers in Transitu—Enemy Vendors—Neutral Purchasers.

A quantity of coffee was shipped by the Salvador branches of a Hamburg firm on two neutral vessels consigned to a neutral firm in Sweden. Portions of the coffee on both vessels being destined for Hamburg were confiscable as contraband, but other portions were destined for neutral purchasers in Sweden who had entered into contracts of purchase, some before and some after the date of shipment, and some of whom had paid for their consignments before the cargoes were seized as prize:—

Held, that, it being well established according to prize law (*a*) that "innocent" goods laden on board a vessel are subject to condemnation if their owner has on board other goods which are confiscable contraband, and (*b*) that during hostilities, or imminent and impending danger of hostilities, the property in cargoes of belligerent parties cannot change its national character during the voyage, it followed that the contracts of purchase were ineffective and the property remained in the enemy shippers; and as they had goods confiscable as contraband on board the same vessels the "innocent" goods were subject to the like penalty.

Suits for Condemnation of Cargoes as Prize.

In these cases the Procurator-General, on behalf of the Crown, claimed the condemnation of large quantities of coffee laden on board two Swedish vessels, the *Kronprinsessan Margareta* and the *Thai*, which were diverted to Kirkwall in the course of their voyages from various ports in the Republic of Salvador to Stockholm. The consignments of coffee on the *Thai* were seized as prize on May 15, and the consignments on the *Kronprinsessan Margareta* on August 15, 1915. In every case the consignee named in the bill of lading was one Theodor Sack, the trade name of one Christian Pyk, of Stockholm.

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In the case of *The Kronprinsessan Margareta* claims were filed on behalf of five different Swedish firms who had entered into contracts of purchase with the vendors, Goldtree, Liebes & Company, of Hamburg, whose Salvador branches were the nominal shippers of the goods. In the case of *The Thai* claims were filed on behalf of two Swedish firms who had paid for the consignments of coffee claimed by them before the date of seizure. The facts relating to the respective claims are sufficiently stated in the judgments.

The ground on which the Crown claimed condemnation was that, although the various consignments of coffee were destined for neutral purchasers, being post-bellum shipments, the property had not passed, and could not pass in transitu to the purchasers but remained in the enemy shippers, who were the owners of a quantity of coffee laden on the same vessels and destined for Hamburg; and therefore that the doctrine of infection applied whereby the coffee with a neutral destination was subject to the same penalty as the consignments of coffee confiscable as being contraband destined for an enemy base of supply. The latter consignments the learned President condemned as prize on March 9, 1917.

Sir Frederick Smith, A.-G., Stuart Bevan, and *Hull,* for the Procurator-General.

Sir Erle Richards, K.C., and *Balloch,* for the claimants the Import Aktiebolaget Vict. Th. Engwall & Company; Berg & Hallgren; and Levin Levander.

Balloch, for the Aktiebolaget Kaffee Import Rostereit "Orienten."

L. F. C. Darby, for Rudolf Ofverstrom.

L. Noad, for the Import Aktiebolaget Engwall, Hellberg & Company, and the Aktiebolaget C. O. Wessen, in respect of consignments of coffee on the *Thai.*

[It was admitted by counsel for the various claimants that the doctrine of infection was well established; but it was contended that where contracts of sale had been entered into, in some cases before the date of shipment and in all before the date of seizure, the doctrine had no application; the object of the doctrine was to punish the person trading in contraband goods, and not the neutral

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purchasers on whom the loss would fall. Neither in the old English cases of *The Vrow Margaretha* (1) and *The Staadt Embden* (2), nor in the American cases of *The Peterhoff* (3) and *The Springbok* (4), where the doctrine was applied, was there any question of sale to neutral purchasers prior to seizure; the decision of the Japanese Prize Court in *The Hsiping* (*Claim of Teng Ming Cheng*) (5), that where, according to the bills of lading, the goods are at the disposal of the shipper or his agent the Court will not inquire whether they are in fact his property, ought not to be followed. The claimants further argued that the rule that, according to prize law, after shipment goods belonging to belligerent parties cannot be transferred to neutrals in the course of the voyage was only applicable to the case of enemy goods which otherwise would be condemned as enemy property, and did not apply to goods which could only be condemned on the ground that they were contraband and destined for the enemy. *The Pehping* (6), *The Lydia* (7), *The Bawtry* (8), *The Alwina* (9) and *The United States* (10), were also referred to.]

Cur. adv. vult.

THE KRONPRINSESSAN MARGARETA.

March 14. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—Quantities of coffee were shipped on this Swedish vessel from Acajutla and La Libertad, in the Republic of Salvador, to Stockholm at the beginning of July, 1915. They were consigned in the name of Gonzales & Company to Theodor Sack as consignee in each case. In all 4250 bags (weighing 255 tons) were shipped under several bills of lading. One thousand eight hundred bags have already been condemned as prize, as conditional contraband belonging to enemies and destined for Hamburg. The

(1) (1799) 1 C. Rob. 336; 1 Eng. P. C. 149.
(2) (1798) 1 C. Rob. 26; 1 Eng. P. C. 37.
(3) (1866) 5 Wall. 28.
(4) (1866) 5 Wall. 1.
(5) (1905) 2 Russ. & Jap. P. C. 140.
(6) (1905) 2 Russ. & Jap. P. C. 164.
(7) (1905) 2 Russ. & Jap. P. C. 367.
(8) (1905) 2 Russ. & Jap. P. C. 270.
(9) [1916] P. 131.
(10) Ante, p. 30.

remaining 2450 bags remain to be dealt with. They are the subject of various claims.

The list of claimants is as follows :

Claim.	Claimants.	Quantity.	Weight.
A.	Import A/B Vict. Th. Engwall & Company	750 bags.	45 tons
B.	Berg & Hallgren	250 ,,	15 ,,
C.	Levin Levander	250 ,,	15 ,,
D.	Rudolf Ofverstrom . . .	150 ,,	9 ,,
E.	A/B Kaffee Import . . .	500 ,,	30 ,,
	Rostereit " Orienten " . . .	550 ,,	33 ,,

All the above quantities were laden at Acajutla, except the last, which was laden at La Libertad. The vessel sailed from Acajutla on July 4, and from La Libertad on July 9, 1915. The seizure was on August 15, 1915. After investigation, when the real facts were ascertained, it was found that at the time of shipment the owners of the goods were Goldtree, Liebes & Company, of Hamburg.

The letters and cablegrams contained in the exhibits to the affidavit filed on behalf of the Procurator-General show clearly that Gonzales & Company was merely used as a name to conceal that of Goldtree, Liebes & Company, who had several agencies in Salvador acting under the same name as the head office at Hamburg ; and that Theodor Sack (the name in which one Christian Pyk of Stockholm carried on business) acted in these and in other matters as agent or intermediary for Goldtree, Liebes & Company, of Hamburg.

Apart from these exhibits it was shown in one of the cases—that of Berg & Hallgren—that after a formal contract was signed by Goldtree, Liebes & Company at Hamburg on July 10 for 250 bags of coffee " shipped by Goldtree, Liebes y Cia., or by Gonzales & Company, or by Francisco Mojica " (the latter being another name similarly used), Theodor Sack, after he knew of the seizure, attempted to substitute another contract of Gonzales y Cia. for the Hamburg one of July 10. It is not necessary to elaborate this point, because finally it was not disputed by counsel for any of the claimants that Goldtree, Liebes & Company, of Hamburg, were the owners at the time of shipment, and were the vendors under the contracts

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for sale to the respective purchasers, upon which the latter found their claims.

The matters in contest between the Crown and the claimants are two : first, as to who were the owners of the goods according to the law of prize at the time of seizure ; and secondly, whether the goods which the claimants had bona fide contracted to buy, could be condemned as contraband by the application of the doctrine of infection or contagion, by reason of there being contraband goods belonging to the same owners on board the same vessel.

Before dealing with the particular facts of the different cases it will be convenient to determine and state the legal principles which have to be applied.

It must be remembered that the Court is dealing in these cases with post-bellum shipments. I have on other occasions during this war pointed out the difference between the principles to be applied to transactions taking place before war, and after war: see *The Miramichi* (1) and *The Southfield.* (2)

It is well established as a principle of prize law that during hostilities, or imminent and impending danger of hostilities, the property in cargoes of belligerent parties cannot change its national character during the voyage, or, as it is commonly expressed, in transitu ; and that if neutrals purchase goods in transitu during a state of war existing, or imminent and impending danger of war, the contract of purchase is held invalid, and the property is deemed to continue as it was at the time of shipment until the actual delivery : see Pratt's Story, at p. 64. As Lord Kingsdown said in the judgment delivered in the Privy Council in *The Baltica* (3), the general rule is open to no doubt. He there stated it in precise and unambiguous terms as follows : " A neutral, while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and vendee, is good also against a captor, if war afterwards unexpectedly break out. But, in case of

(1) [1915] P. 71. (2) (1915) 1 Br. & Col. P. C. 333.
(3) (1858) 11 Moo. P. C. 141, 145, 146.

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war, either actual or imminent, this rule is subject to qualification, and it is settled that in such a case a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change the property as against captors, as long as the ship or goods remain in transitu."

He discusses two alternative grounds for the rule, one being that, while the ship is on the seas, the title of the vendee cannot be completed by actual delivery; and the other that the ship and goods having incurred the risk of capture by putting to sea shall not be permitted to defeat the inchoate right of capture by belligerents until the voyage ends. He gives the preference to the former ground; and amplifies it in the following passage: "Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading, or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the Courts have laid down as a general rule, such transfers without actual delivery shall be insufficient; that in order to defeat the captors, the possession, as well as the property, must be changed before the seizure."

As to the other matter in contest, Sir Erle Richards (whose able argument was adopted by the other counsel) did not question the doctrine of infection or contagion; but only canvassed its application to the facts of the present case. The doctrine is too well settled to be disturbed. I see no reason for weakening it, and the apprehension of the learned counsel that its application in the present cases would be an unreasonable extension of the principle does not appear to me to have any foundation. In my view to apply it to these cases involves no extension—certainly not an unreasonable or unwarrantable one.

The rule is simple and broad. If the person who is the owner of confiscable contraband goods laden on board a vessel has also goods belonging to him which are not contraband on the same vessel, the latter—sometimes called innocent goods—are subject to capture and condemnation as well as the contraband goods. The rule has come from ancient times right down to the days of the Declaration of London, and has been applied in all maritime wars for, at any rate, a century and a half.

It has been stated in the Supreme Court of America in these

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terms : " And it is an established rule that the part of the cargo belonging to the same owner as the contraband portion must share its fate. This rule is well stated by Chancellor Kent thus : ' Contraband articles are infectious, as it is called, and contaminate the whole cargo belonging to the same owners, and the invoice of any particular article is not usually admitted to exempt it from general confiscation ' " : per Chase C.J. in *The Peterhoff*. (1)

It was incorporated in the Prize Regulations of Japan in 1904, in art. 43, as follows : " Articles which are contraband of war, and that portion of the cargo which belongs to the owners of the contraband, shall be condemned." Effect was given to it by the Japanese Prize Courts in many cases which were cited at the Bar.

It was urged that the doctrine had been adopted in order to impose an additional punishment upon persons carrying on trade in contraband ; and that bona fide neutral purchasers at whose risk the goods might be should not come within the reach of such a punishment. By this I think was meant that neutrals who had honestly entered into contracts to purchase, even if they had not become the owners, should somehow be protected from the possible results of the exercise of a belligerent's rights of capture. How is a Court of Prize to investigate where the particular loss or " punishment " would fall ? It may be that the intending purchaser loses nothing, that the loss would fall in toto upon underwriters, or re-insurers, in one or more countries. Inquiries such as these will not be embarked upon by a Prize Court, any more than inquiries as to liens, mortgages or charges. It deals with the tangible goods as they are found in the vessels. It has direct means of deciding who are the owners of goods afloat in time of war, and it will not leave the high road to wander in a maze of by-ways. If it decides that A. is the owner of contraband goods, and also of goods not contraband on board the same vessel, if the former are condemned, the latter will also come under the same sentence.

Having considered thus far the principles relating to the matters in dispute, I now come to apply them to the facts in these cases.

By the bills of lading in each case the goods were consigned to Stockholm to Theodor Sack, the agent of Goldtree, Liebes & Company, and in each one of them which was produced was the note

(1) 5 Wall. 28, 59.

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"Insured under open policy of consignees," and in one of them was added "against all risks, war included."

At the time of seizure the bills of lading were held by Theodor Sack, or his, or Goldtree, Liebes & Company's, bankers in all the cases.

In claim A the contract with the claimants was made on July 2 or 9. It may have been made on July 2 and confirmed on July 9. It does not seem to me to matter. The contract was f.o.b. at Acajutla, and the price was to be paid 90 per cent. in cash against documents and 10 per cent. on arrival. The documents had not been taken up before seizure. It was stated that the 90 per cent. was paid after seizure.

In claim B the contract was made after the ship sailed and while the goods were afloat. The terms and circumstances were the same as in the last claim.

In claim C the contract was made on July 2. The terms and circumstances were the same as in claim A.

In claim D the facts were similar to those in claim C.

In claim E the contracts were made after shipment, and when the goods were afloat. They were c.i.f. contracts for Gothenburg. Payment was to be net cash against documents. No documents were taken up and no payments made. On August 16—after seizure—the shipowners gave a delivery order for the 550 bags to Theodor Sack.

As to all the consignments, notwithstanding the statement on the bills of lading as to the insurance by consignees insurances were also effected by the intending purchasers. Although the goods were consigned to Stockholm, they were apparently by the contracts and invoices all for delivery in Gothenburg. As to all the cases, it is obvious that such transfer of property as there was (if any) was merely by documents, and not by actual delivery. The intending purchasers had at best only "paper transfers" and no "possession."

Accordingly, applying the principles before stated, two results follow. One is that all the contracts of purchase are held to be invalid; and thus all the claims under such contracts necessarily fall to the ground and must be disallowed. The other is that the property in all the goods is deemed to have continued as it was at the time of shipment up to the time of seizure, namely, in the

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enemy shippers. In other words, the enemy shippers were at the seizure the owners of the goods according to the doctrines of the Prize Court.

Apart, therefore, from all questions as to the destination of the goods they are subject to condemnation, because their owners also had goods on board the same vessel belonging to them which were contraband and subject to condemnation as such.

Upon the question of infection, the claimants have not, in strictness, any right to be heard, or, at any rate, any right to complain, because the decision of the Court is that they have not established any ownership in the goods; and infection only affects the real owners.

I may add that, even if the doctrines of the common law as to the passing of property in times of peace were to be applied in the circumstances of these cases, I should hold that the property in the goods had not vested in any of the claimants at the time of seizure.

The judgment of the Court is that all the goods claimed are condemned as good and lawful prize.

THE THAI.

March 19. THE PRESIDENT (SIR SAMUEL EVANS). These cargoes were carried on the *Thai*, a Swedish ship from Acajutla to Stockholm, the consignor being somebody of the name of Francisco Mojica, and the consignee being Theodor Sack. I have already decided in respect of other cargoes that Francisco Mojica was a mere name which was used by Goldtree, Liebes & Company, whose chief centre of business was in Hamburg, and which had branches or agencies in the Republic of San Salvador. I have already condemned twenty cases of balsam carried by the same ship and consigned by Mojica to Theodor Sack, and also 200 sacks of washed Salvador coffee as well as 250 sacks of unwashed coffee, parts of the cargo which were unclaimed.

There remains to be dealt with two other claims, namely, that of the Import Aktiebolaget Engwall, Hellberg & Company to 350 sacks of unwashed coffee weighing 21 tons, and of the Aktiebolaget C. O. Wessen, who claim a similar quantity of 350 sacks weighing 21 tons.

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The ship sailed from Acajutla on April 7, 1915, and the goods were seized on May 15.

I will deal first of all shortly with the case of the Import Aktiebolaget Engwall, Hellberg & Company. The contract for the sale of these goods to Engwall, Hellberg & Company was made with Goldtree, Liebes & Company. It was made before the sailing of the vessel. It was a c.i.f. contract, cash was to be paid against bills of lading, less a certain discount of 1 per cent. The bill of lading was dated March 29, and the invoice March 30. There is a certificate given by some Swedish bank that payment was made on May 7, 1915. That would be a payment before the seizure. In many of these cases the evidence as to payment consists of a certificate of the kind which was given in the particular case with which I am now dealing. I am not wholly satisfied with that kind of evidence, and the affidavit in this, and in the next case too, merely refers to such a certificate in proof of payment. However, the Crown did not contest the bona fides of these claimants, and I must assume that payment was made somewhere about May 7—that is to say, before the actual seizure of the goods. There were some peculiar circumstances with reference to the appearance. The appearance was first of all entered on November 22, 1915, for Engwall, Hellberg & Company, and on May 23, 1916, an order was made amending the appearance by substituting the name of Theodor Sack. Theodor Sack was the agent in Stockholm for Goldtree, Liebes & Company, of Hamburg. On July 31, 1916, an order for security was made against Sack. A little later a claim was put forward again by Engwall, Hellberg & Company. The short facts fall within the case of *The Kronprinsessan Margareta*, in which I delivered judgment a few days ago, and the same principles have to be applied. Inasmuch as the goods were enemy goods when they were shipped and were consigned to the agent for the enemy firm at the time of seizure, although a paper transfer, as it has been called, has been established in this case to an intending purchaser, the goods, nevertheless, are subject to capture and confiscation as prize exactly in the same way as those with which I dealt in *The Kronprinsessan Margareta* judgment.

The next claim is that of the Aktiebolaget C. O. Wessen. That is in the essential features similar. It is a claim by a company who

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THE THAI.

The President.

say that they entered into a contract on November 25, 1914, before the vessel sailed, and of course before the seizure of the goods. There are some peculiar circumstances in that case, because there was an attempt after capture to show that Francisco Mojica was the person who entered into the contract, whereas the contract, when it is referred to, was clearly made in express terms between Goldtree, Liebes & Company and the Aktiebolaget C. O. Wessen, who knew nothing at all about Francisco Mojica. After the seizure Mr. Sack, for Goldtree, Liebes & Company, tried to substitute for Goldtree, Liebes & Company the name of Francisco Mojica, and a substituted contract was sent. The Aktiebolaget C. O. Wessen only knew Goldtree, Liebes & Company in the transaction. The final invoice for the goods was an invoice of November 25, 1915, long after the date of seizure, and which is in these terms : " Final invoice. Messrs. C. O. Wessen & Co., Limited, Sundsvall, Dr. to Goldtree & Liebes, Hamburg, for arrived 350 bags unwashed Salvador coffee per s.s. *Thai*." It is said that these goods also were paid for before the actual date of seizure. As I have said, that, in my view, makes no difference. The circumstances of the case bring it entirely within the principles which I endeavoured to set out in *The Kronprinsessan Margareta*.

The result is that the goods belonged to the enemy firm of Messrs. Goldtree, Liebes & Company, and were on a ship which was carrying contraband. Even if these goods had been innocent goods they would be tainted with the doctrine of infection, and would be confiscable on that ground.

I therefore make an order condemning the 350 sacks of coffee claimed by the Import Aktiebolaget Engwall, Hellberg & Company and the 350 sacks claimed by the Aktiebolaget C. O. Wessen as good and lawful prize.

Solicitor for the Procurator-General : *The Treasury Solicitor.*

Solicitors for claimants : *Botterell & Roche ; Travers, Smith, Braithwaite & Co. ; Thomas Cooper & Co.*

E. C. T.

STONE *v.* STONE AND OSBORNE.

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April 23.

Divorce—Adultery—Discretionary Bar—Desertion—Failure to comply with Decree for Restitution of Conjugal Rights—Failure to enforce such a Decree—Desertion not conducing to Adultery—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 31—*Matrimonial Causes Act*, 1884 (47 *&* 48 *Vict. c.* 68), *s.* 5.

The statutory desertion arising under the Matrimonial Causes Act, 1884, by reason of the failure of a spouse to comply with a decree for restitution of conjugal rights, is only a discretionary bar to his or her claim for relief on the ground of subsequent adultery of the other spouse.

Where the Court is satisfied that the statutory desertion has not conduced to the adultery and that the deserted spouse took no active steps to enforce the decree for restitution, the Court may exercise its discretion by granting relief in respect of the subsequent adultery, in spite of the statutory desertion of which the complaining spouse has been guilty.

THIS was a husband's petition for dissolution of the marriage on the ground of his wife's adultery.

The parties were married on October 6, 1900, at Eastbourne. There was issue of the marriage one son only, born in 1907. In 1908 the parties separated by mutual consent. In October, 1908, the wife wrote to the husband asking him to return, but he refused. The wife then filed a petition for restitution of conjugal rights, and an order was made on January 18, 1909. The husband did not appear on this petition and took no notice of the order. The wife took no steps to enforce the order or to obtain maintenance from her husband. She went on the stage and supported herself mainly by her own earnings, but her husband sent her some money at times until 1912, when she inherited an income of about 300*l.* a year.

On December 13, 1915, the wife wrote a letter to her husband confessing that she was living with the respondent, had had a child by him, and intended to go on living with him.

The husband then filed this petition. Neither the respondent nor the co-respondent appeared.

The only question which is thought to require a report was

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whether the statutory desertion by the husband disentitled him to relief.

R. F. Bayford, for the petition. The non-compliance of the husband with the order obtained by the wife for restitution of conjugal rights is a discretionary bar only under 20 & 21 Vict. c. 85, s. 31. In *Mulley* v. *Mulley* (1) Bargrave Deane J. granted a decree notwithstanding that the husband had not complied with a similar order; and in *Duplany* v. *Duplany* (2) Jeune J. held that desertion by a wife, though without reasonable excuse, was no legal answer to her claim for judicial separation on the ground of her husband's adultery, because it could not be held to have conduced to his conduct. The judge's statement of the law applies here. It cannot be said that the husband's conduct conduced to the adultery.

HILL J., after dealing with other points raised in the case which are not thought to require a report, continued: Then comes the last question, which is really a difficult one—whether the husband ought to be refused the granting of his decree because he has legally deserted his wife by the fact that he has not obeyed an order for restitution of conjugal rights made in 1909. I think it is quite clear that, though the wife obtained an order, there was no real and active anxiety on her part that the parties should live together again. He met her from time to time. She was on the stage at any rate part of the time. She was apparently partly supporting herself, and was supported partly by her husband. She after a time inherited some money from her father; and there does not seem to me to have been at any time any pressure by her to get her husband to obey the order.

In the next place I do not think that the separation has really conduced to the adultery. At the time at which she committed adultery she was in receipt of something like 300*l.* a year, and therefore want of means cannot have led to her conduct. I find it impossible under these circumstances to say that the fact that the husband is not living with his wife and has refused to obey the order is any justification at all for the wife committing adultery or can be regarded as the cause of her so doing.

(1) (1909) 53 Sol. J. 469. (2) [1892] P. 53, 57.

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Hill J.

I think, therefore, that, applying the same principle as was applied in the case of *Mulley* v. *Mulley* (1), I am justified in saying that, notwithstanding the fact of legal desertion by the husband, I can properly exercise the discretion which rests with me by saying that the husband is entitled to his divorce. I pronounce a decree nisi.

The husband not asking for the immediate custody of the child, who had been with the mother since the separation, the question of custody was adjourned into chambers.

Solicitors for petitioner: *Gard, Lyell, Betenson & Davidson.*

J. R. B.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

1917

April 24, 30.

THE TRIUMPH; THE USK.

IN THE MATTER OF THE SURRENDER OF TSINGTAU.

(IN PRIZE.)

Prize Court—Prize Bounty—Destruction of Enemy Warships—Combined Naval and Military Operations—Naval Prize Act, 1864 (27 & 28 *Vict. c.* 25), *s.* 42—*Order in Council of March* 2, 1915.

The officers and crews of His Majesty's ships are not entitled to prize bounty under s. 42 of the Naval Prize Act, 1864 (put in force by an Order in Council of March 2, 1915), for the destruction of enemy ships of war, if the destruction was the result of joint naval and military operations although the land and sea forces were operating under separate commanders.

MOTION FOR PRIZE BOUNTY.

The claimants, the commanders, officers, and ships' companies of H.M.S. *Triumph* and H.M.S. *Usk*, sought a declaration that in accordance with the provisions of s. 42 of the Naval Prize Act, 1864, put in force by an Order in Council of March 2, 1915 (2), they were

(1) 53 Sol. J. 469.

(2) Sect. 42 of the Naval Prize Act, 1864, is as follows: "If, in relation to any war, Her Majesty is pleased to declare, by Proclamation or Order in Council, Her intention to grant prize bounty to the officers and crews of Her

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entitled to prize bounty for having been present at the destruction off Tsingtau of the Austrian cruiser *Kaiserin Elisabeth* and of five German gunboats and a German torpedo-boat destroyer.

According to the affidavit of Commodore FitzMaurice, the *Triumph* and the *Usk* joined the Japanese naval forces, and, throughout the operations which culminated in the fall of the fortress of Tsingtau, conformed to the movements of the Japanese fleet. The operations were carried out by the naval and military forces of Great Britain and Japan during September, October, and November, 1914, until the fortress surrendered on November 7. The naval operations consisted in the enforcement of a vigorous blockade and in the bombardment of the forts and the naval forces of the enemy. The enemy ships in the harbour were not visible from seaward, and in consequence it was not possible to observe the result of the shots from the bombarding vessels; but upon several occasions the shore observation station of the Allies reported that a ship in the harbour had been blown up and sunk. On November 3 the *Kaiserin Elisabeth* was blown up, and when the fortress surrendered it was ascertained that the six other enemy vessels had also been sunk.

The total number of persons on board the enemy ships according to the official casualty lists was 1200, and the bounty claimed, therefore, amounted to 6000*l*.

Commander Maxwell Anderson, R.N., for the claimants. Although in 1818, in the case of *La Bellone* (1), Sir W. Scott held that the co-operation of military with naval forces defeated the right of the Navy to prize bounty, which has always been a purely naval award, the Court should have regard to the totally different conditions which prevail at the present time. Steamships were unknown a century ago, and the sailing ships of the enemy could not proceed to sea at will, whereas in the present case, but for the naval forces of

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Majesty's ships of war, then such of the officers and crew of any of Her Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of Her Majesty's enemies shall be entitled to have distributed among them as prize bounty a sum calculated at the rate of five pounds for each person on board the enemy's ship at the beginning of the engagement."

(1) (1818) 2 Dods. 343.

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THE TRIUMPH; THE USK.

the Allies, the enemy ships could have put to sea whenever they wished, and the allied military forces occupying the heights of Tsingtau would have been unable to prevent their escape. The facts in *La Bellone* (1) were entirely different. That vessel was captured as the result of a combined naval and military expedition under one officer, whereas the naval and military forces operations at Tsingtau were under separate commanders and were entirely distinct. [*The Banda and Kirwee Booty* (2) was also referred to.]

Pearce Higgins, for the Procurator-General. There is no material difference between the wording of s. 5 of 45 Geo. 3, c. 72, under which *La Bellone* (1) was decided, and the wording of s. 42 of the Naval Prize Act, 1864, and Sir W. Scott's decision, therefore, is a direct authority against the claimants' contention. The American law on the subject is to the same effect. In *Porter* v. *United States* (3) it was held that under the Act of Congress, June 30, 1864, c. 174, bounty was not payable for the destruction of enemy vessels by the combined action of the naval and military forces of the United States: see also *Dewey* v. *United States* (4) and *The Siren*. (5) [*The Ville de Varsovie* (6) was also referred to.]

Cur. adv. vult.

April 30. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—In the early period of the war the German fortress of Tsingtau was besieged, bombarded, and reduced by joint operations on land and by sea of Japanese and British military and naval forces. The land forces of Japan were under the command of Lieutenant-General Kamio as commander-in-chief. Those of Great Britain consisted of the 2nd Battalion South Wales Borderers and the 36th Sikhs of the Indian Army, under the command of Brigadier-General Barnardiston. The Japanese naval forces were the First and Second Japanese Fleets, commanded by Vice-Admiral Tomasobaroh Kato and Admiral Kato respectively. The British ships of war which assisted in the operations were H.M. battleship *Triumph* and H.M. destroyer *Usk*, of which Commodore FitzMaurice and Lieutenant-Commander Maxwell were respectively in command.

(1) 2 Dods. 343.
(2) (1866) L. R. 1 A. & E. 109.
(3) (1882) 106 U. S. 607.
(4) (1900) 178 U. S. 510.
(5) (1871) 13 Wall. 389.
(6) (1818) 2 Dods. 301; 2 Eng. P. C. 220.

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THE TRIUMPH; THE USK.

The President.

The siege ended on the surrender *en bloc* of the fortress, which the German Emperor described as "the review ground of German *Kultur* created by many years' work."

During the siege the Austrian cruiser *Kaiserin Elisabeth* and the German gunboats *Iltis*, *Jaguar*, *Tiger*, *Luchs*, and *Cormoran*, and the German torpedo-boat destroyer *Taku* sheltered in the harbour of Tsingtau. There they were completely blockaded. Before the surrender they were all destroyed and sunk. They were fired upon from land and sea; but there is no adequate evidence to show whether they were ultimately sunk by Japanese or British forces, or by the action of their own officers preceding the surrender. The legal position of the present claim, however, is not affected by that circumstance.

The number of persons on board these enemy ships in all was 1200. The claim now before the Court is made on behalf of the commanders, officers, and crews of the *Triumph* and *Usk* for 6000*l.* as prize bounty at the rate of 5*l.* a head of the men in the enemy ships.

The question arising for decision is whether in the circumstances any prize bounty is payable. This depends on the proper application of the enactment now in force dealing with this subject, which is s. 42 of the Naval Prize Act, 1864.

I stated generally the history of the grant of prize bounty (or head money, as it was formerly called) in the case of *H.M. Submarine E* 14. (1) It is necessary to distinguish clearly between prize ships or cargoes and prize bounty. "Prize" is property captured or seized by commissioned or authorized captors at sea or in ports, and is now condemned in favour of the Crown, either in its own right or in its right to droits of admiralty. "Prize bounty," on the other hand, is a grant made out of public moneys under the authority of Parliament as a reward for bravery resulting in success in naval engagements. Its amount and the conditions of its grant are defined by the Act of our Legislature; and the jurisdiction of this Court to allow it is limited strictly by the Act of Parliament.

As Sir William Scott said in the case of *La Bellone* (2), "The whole of this subject is the creature of mere positive law. Head money is not property acquired in any manner by the captors, or to be demanded on the ground of any antecedent title. It is a mere

(1) Ante, p. 85. (2) 2 Dods. 343, 348, 349.

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The President.

voluntary grant of public money; and the grantees must be content to take what is actually given and no more. The Court cannot amplify the grant by constructive analogy, and by so doing take upon itself the double impropriety of imputing blame to the legislature for a supposed omission, and arrogating to itself the further disposal of public money. By every rule of interpretation that can apply to such a matter, the Court is bound to confine its exposition within the very letter of the statute, if that letter speaks an intelligible language."

Sir William Scott pronounced the decision in *La Bellone* (1) in 1818. The statute then in force dealing with prize bounty, or head money, was 45 Geo. 3, c. 72, s. 5. The case arose in relation to an enemy ship captured in Port Louis on the capitulation of the Isle of France after a blockade by the land and sea forces of Great Britain. The question whether prize bounty was payable was raised in friendly proceedings in order to obtain the formal decision of the Prize Court, so that the Treasury, as the custodian of the public funds, might know what it was authorized to do. It was decided by the Court that head money could only be paid where the capture or destruction of enemy ships of war was effected by naval forces alone; and that where the capture or destruction was the result of joint action of the armed forces on land and of ships at sea it could not be paid.

Sir William Scott said (2): "The grant in the whole of its extent relates to naval capture only. Where it is not purely naval, the statute has thought fit to be silent; and it is not for this Court to introduce a different description of service into a grant where it is not."

There is no essential or material difference touching this question between the enactment now in force and that which was applied in the authority quoted. The provisions as to prize bounty contained in the Naval Prize Act of 1864 were enacted when the decision in *La Bellone* (2) stood as the last word of the English Prize Court on the subject. They must be read with reference to the law as then pronounced. The Legislature could, of course, have altered it; but it did not think fit to do so.

In the special circumstances of the present case, I think it right to

(1) 2 Dods. 343, 348, 349. (2) 2 Dods. 343, 349.

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THE TRIUMPH; THE USK.

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mention that the Court is not called upon to consider whether the fact that Japanese forces—military and naval—took part, and a leading part, in the operations, affects the legal question which arises. I decide the case quite apart from that special circumstance. Even if British forces alone had carried out the engagement or operations which resulted in the destruction of the enemy's ships of war, I pronounce that as their destruction was not brought about by naval action alone, but was the result of the joint operations of land and naval forces, prize bounty is not payable.

I regret that the law, accordingly, leaves me no alternative but to disallow the claim and dismiss the application for the bounty.

Solicitor for claimants: *Arthur Tyler, for Stilwell & Sons, Navy Agents.*

Solicitor for Procurator-General: *The Treasury Solicitor.*

E. C. T.

Referred to. OIVIND LORENTZEN'S CASE. [1949] A. C. 236

1917

May 1, 2, 24.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

THE ECHO.

[1916, fol. 1824.]

Admiralty—Collision—Dropping Pilot—"Keep her course and speed"—Regulations for Preventing Collisions at Sea, 1897, *art.* 21.

By art. 21 of the regulations for preventing collisions at sea it is provided that where by any of the regulations one of two vessels is to keep out of the way, "the other shall keep her course and speed":—

Held, that a steamship required under this article to keep her course and speed, which was, to the knowledge of the give-way vessel, engaged at the material time in a nautical manœuvre involving an alteration of both course and speed (dropping the pilot), was not committing a breach of the article in reducing speed and altering course in order to arrive at the proper and usual place to drop the pilot into the pilot boat.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Laxton* and her master and crew proceeding for their clothes and effects.

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THE ECHO.

The defendants were the owners of the Norwegian steamship *Echo*.

On December 28, 1916, about 1.15 P.M., the *Laxton*, a screw steamship of the port of Goole, 1017 tons gross and manned by a crew of sixteen hands, was proceeding out of the Humber in charge of a duly licensed Humber pilot. The wind was about S.S.W., a fresh breeze, and the tide was ebb of the force of about two and a half knots. The *Laxton's* case was that she was just opening out from Spurn Point, and was standing across towards the Bull lightship making about eight knots, when the *Echo* was seen distant about three miles and bearing about four points on the port bow. After passing the Bull lightship the engines of the *Laxton* were reduced to half speed in order to ease down for the pilot cutter. About five minutes later the engines were further reduced to slow and the helm was ported so as to round for the pilot cutter, which was then to the southward, and one short blast was sounded on the whistle. The *Echo*, however, continued to approach, causing risk of collision, and, although the engines of the *Laxton* were stopped and reversed full speed astern, the *Echo* struck the *Laxton* on her port side, doing her so much damage that she shortly afterwards sank.

The plaintiffs alleged that the *Echo*, having the *Laxton* on her own starboard side, was to blame under art. 19 of the regulations for preventing collisions at sea for not keeping out of the way.

According to the defence and counter-claim, the *Echo*, a screw steamship of 500 tons gross manned by a crew of thirteen hands, was following another steamer into the Humber, and was steering a course of W.N.W. magnetic, making about five or six knots through the water, when the *Laxton* was noticed about one and a half miles away and bearing about five or six points on the starboard bow. She was approaching on a course that would take her well clear under the stern of the *Echo*. Shortly afterwards the course of the *Echo* was altered to N.W. by W. to shape towards a small boat from the pilot cutter. The *Laxton* continued to approach in a direction to pass safely astern of the *Echo* until she was a short distance off, when she was seen to be swinging under port helm. Thereupon the engines of the *Echo* were stopped, her helm was put hard-a-port, and her whistle lanyard was pulled to give the regulation signal,

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but no effective sound came from the whistle owing to the presence of water therein. Shortly afterwards her engines were put full speed astern and her whistle was sounded three short blasts. The *Laxton*, however, continued to swing under port helm and the two vessels came into collision.

The defendants alleged, inter alia, that the *Laxton* failed to keep her course and speed in accordance with art. 21 of the regulations.

Laing, K.C., and *Balloch*, for the plaintiffs.

Bateson, K.C., *D. Stephens*, and *A. Wallace Grant*, for the defendants.

The arguments of counsel sufficiently appear from the judgment.

Cur. adv. vult.

May 24. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment :—The facts upon which the decision in this case depends are within a narrow compass ; and they are clearly established, quite outside the region of doubt, by the evidence. They can be stated briefly : The plaintiffs' vessel, the *Laxton*, was proceeding upon a voyage out of the Humber. The defendants' vessel, the *Echo*, was coming on her voyage into the Humber. Before the collision the two vessels were making for the pilot cutter, stationed about a mile to the S.S.E. of the Bull lightship, the one in order to drop and the other to pick up her pilot. The pilot cutter was at her usual station in the state of the tide as it then existed. At all material times, as they approached the pilot cutter, the *Laxton* was on the starboard bow of the *Echo*.

The *Echo* was navigated by the master, who was alone on the bridge with his helmsman. He had the responsibility of keeping the look-out, of operating the telegraph to the engine-room, of giving signals, and the orders to the wheel. In a word, he had all the duties as well as the responsibilities of navigating the ship, except only the actual working of the wheel. His evidence cannot be accepted against that of the plaintiffs. His marking of the chart to indicate where the vessels were when he first sighted the *Laxton* and where the collision took place was hopelessly wrong ; and his evidence generally was not reliable. It should be stated that the day of the

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collision was the first time he had gone up the Humber in charge of a vessel. But he knew that the *Laxton* as well as his own vessel was making for the pilot cutter.

Before the collision three vessels were proceeding out of the Humber at distances of about half a mile—each of which had a pilot to drop. The first, the *Ardnagrena*, had dropped her pilot into the small boat of the pilot cutter. The small boat afterwards made for the *Laxton*, which was following in the wake of the *Ardnagrena*, in order to take her pilot. The *Laxton's* speed had been reduced so that the pilot might be dropped. By the time of the collision the small boat was alongside on the starboard side of the *Laxton* and had actually received the latter's rope. I accept the plaintiffs' account of the place of collision.

The third vessel, the *Professor Buys*, followed the *Laxton*, and was reducing her speed similarly and for the same purpose.

The *Echo*, however, proceeded on her course till almost immediately before the collision without reducing her speed very materially from her admitted full speed of eight knots through the water.

The tide was ebb of the force of about two and a half knots on both pleaded stories, and was running from N.W. to S.E. In some of the defendants' documents the strength of the tide was put at over five knots, and the cause of the casualty was stated in the master's deposition to have been "the strong tide."

The defence made against the plaintiffs' case at the trial was that the plaintiffs' look-out was defective; and that the *Laxton's* course and speed had not been kept. I find that the look-out on the *Laxton* was well kept and efficient.

As to the change in course and speed, I find that at all material times the *Laxton* was carefully and properly navigated both as to course and speed in approaching the pilot boat and the pilot vessel. The helm was ported gradually and effectively to counteract the tide and to arrive at the proper and usual place to drop the pilot. The speed was gradually and carefully reduced for the same purpose. It was not contended, indeed, for the defendants that there was any fault in the navigation of the *Laxton* towards the pilot cutter, assuming that she was right in making for it. She was proceeding on her voyage in the way and for the purpose described to the

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knowledge of the master of the *Echo*, which was the give-way vessel.

In the circumstances the *Echo* cannot be heard to complain that the *Laxton* failed to keep her course and speed in accordance with art. 21.

As to speed in similar circumstances *The Roanoke* (1) is the leading authority. The judgments of Lord Alverstone C.J. and Farwell L.J. may be usefully referred to. But I will only cite a passage from the judgment of Kennedy L.J.: "I will deal, in the first place, with the construction of art. 21 in its application to the circumstances of the present case. Prima facie the direction to keep course and speed appears rigidly to enjoin a maintenance of heading and speed, but it has been held in the case of *The Velocity* (2) that this is not a correct view so far as regards course, and I think that a corresponding qualification ought for similar reasons of practical good sense to be admitted in regard to speed. 'Keeping her speed' ought, I think, to admit the interpretation of keeping that speed which, according to the criterion of good seamanship, is the right speed to be kept in the performance of the nautical manœuvre in which the vessel is at the time engaged. It would be a strange thing if a vessel, in order successfully and in the ordinary and proper way to perform a proper nautical manœuvre, must alter her speed, but, nevertheless, must be held to infringe art. 21 by such alteration if it takes place at a time when she is being approached by another vessel, which is either overtaking her within art. 24, or is a crossing steamship which has her on the starboard side within art. 19, although the manœuvre in which she is engaged, and the necessity of altering speed which the manœuvre involves, are perfectly obvious to the overtaking or crossing vessel, and although the alteration of speed in no way prevents such overtaking or crossing vessel, if properly navigated, from keeping out of her way. It seems to me that this cannot be the right interpretation of the injunction to keep her speed. It would introduce into navigation not infrequently a probable source of danger. A steamer approaching her landing place for goods or passengers, or drawing up to an anchorage, must often either reduce her speed or abandon her object; and yet, if the interpretation of art. 21, for which the *Windsor's* counsel contend, is

(1) [1908] P. 231, 246. (2) (1869) L. R. 3 P. C. 44.

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correct, she is bound, under pain of liability, should a collision occur, for a breach of art. 21, to adopt the latter alternative, if she has in view either a crossing steamer, which has to give way under art. 19, or an overtaking vessel under art. 24. But surely the officer who is navigating the crossing or the overtaking vessel will, in manœuvring his own ship, which has to keep out of the way, count, and ought to be able to count, upon the vessel which he has to avoid being so handled, in regard to speed as well as to course, as the proper execution of the nautical manœuvre in which she is obviously and visibly engaged may dictate; and indeed he may be dangerously misled if she acts differently."

As was there sufficiently indicated, the same reasoning must be applied to change of course as to change of speed; and for change of course, if direct authority were needed, it is supplied by the case of *The Velocity*. (1)

In my opinion there was no negligence in the navigation of the *Laxton*.

On the other hand, I find that the collision was the result solely of the faulty navigation of the *Echo* in not keeping an efficient look-out; in not keeping out of the way of the *Laxton*, by reducing or stopping her speed, or by passing under her stern if it was deemed necessary; and in proceeding at too great a speed towards and into the port side of the *Laxton*.

Judgment must be entered for the plaintiffs on their claim and on the counter-claim, with costs. There will be the usual reference to the Registrar and Merchants to ascertain the damages which the plaintiffs are entitled to recover.

Solicitors for plaintiffs: *Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-on-Tyne.*

Solicitors for defendants: *Holman, Fenwick & Willan, for Hearfield & Lambert, Hull.*

(1) L. R. 3 P. C. 44.

E. C. T.

1917
May 8, 9.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

THE JESSIE AND THE ZAANLAND.

[1916, fol. 530.]

Admiralty—Collision—Steamship lying to one Anchor broken adrift by Steamship under Way—Second Anchor not in Position to be let go—Collision with another anchored Vessel—Rules of Good Seamanship.

The steamship *J.*, riding to her port anchor in the Downs, where a number of vessels were brought up, was run into and broken adrift by the steamship *Z.* There was an ebb tide of the force of three or four knots, and the *J.* drifted down and collided with the steamship *C.*, which was anchored about 500 yards away. The starboard anchor of the *J.* was on the forecastle head and could only be let go by means of the crane and catfall. Two of the blocks of the catfall were broken by the first collision. There was evidence that if the catfall had been uninjured it would have taken eight to ten minutes to let go the anchor. The engines of the *J.* were put full speed ahead when it was found that the second anchor could not be used.

In an action by the owners of the *C.* against the owners of the *J.* and the owners of the *Z.* :—

Held, that both the *J.* and the *Z.* were to blame. The *Z.* was to blame for her negligence in breaking the *J.* adrift, and the *J.* was also in fault inasmuch as in a place like the Downs ordinary careful seamanship required that, whether steam was being kept up or not, the second anchor should be so placed that it could be let go at once if necessity arose.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Carbo I.*

The defendants were the owners of the steamship *Jessie* and the owners of the steamship *Zaanland.*

The collision took place shortly before 2 A.M. on August 1, 1916, in the Downs off Deal. The *Carbo I.*, a steamship of 1379 tons gross, was at anchor heading about S.S.W., and was exhibiting the regulation anchor lights. The weather was fine and clear but dark, the wind light and variable, and the tide ebb running strongly to the northward and eastward. In these circumstances the *Carbo I.* was run into and damaged by the steamship *Jessie*,

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which had been lying at anchor about 500 yards ahead of the *Carbo I.*

By their defence the owners of the *Jessie* denied that the collision with the *Carbo I.* was caused or contributed to by any negligence on the part of those on board the *Jessie*. Their case was that the *Jessie*, a screw steamship of 2256 tons gross, laden with a cargo of iron ore, was brought up in the Downs about abreast of Kingsdown waiting for orders. Her anchor lights were duly exhibited, and she was riding securely to her port anchor with her head to the tide when the steamship *Zaanland* came into collision with her, breaking her adrift and doing her considerable damage. The *Jessie* was unable to get out her starboard anchor owing to her tackle being damaged, and, although her engines were at once ordered to be put full speed ahead as soon as possible and her helm was put hard-a-port, before she could be got under control she drifted on to the *Carbo I.* The collision, it was alleged, was a consequence of the collision between the *Jessie* and the *Zaanland*, and could not have been avoided by the exercise of reasonable and ordinary care and skill on the part of those on board the *Jessie*.

In consequence of this defence the writ was amended and the owners of the *Zaanland* were added as defendants.

By their defence the owners of the *Zaanland*, a screw steamship of 5470 tons gross, which was proceeding to an anchorage, and had, it was alleged, too little way on her to answer her helm, admitted that the collision with the *Jessie* was caused by the negligent navigation of the *Zaanland*. They denied, however, that the second collision was the consequence of the first, and pleaded that it was caused by the negligence of those on board the *Jessie* in not taking proper measures in due time to keep clear of the *Carbo I.*

The arguments sufficiently appear from the judgment.

Balloch, for the plaintiffs.

Bateson, K.C., and *D. Stephens*, for the defendants, the owners of the *Jessie*.

Laing, K.C., and *C. R. Dunlop*, for the defendants, the owners of the *Zaanland*.

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HILL J. The collision in this case took place in the Downs at 2 A.M. (summer time) on August 1, 1916, between the steamship *Carbo I.* and the steamship *Jessie*. The weather was fine and clear, the wind very light, and the tide ebb running to the northward and eastward of the force of three to four knots. The *Carbo I.*, a steamship of 1379 tons gross, was at anchor heading to the tide. The *Jessie*, a steamship of 2256 tons gross, which was at the moment of collision in motion, collided with the *Carbo I.*, the *Jessie* with her starboard side about amidships striking the stem of the *Carbo I.* The *Carbo I.* originally sued the *Jessie* alone. The *Jessie* pleaded that the collision could not be avoided; that the *Jessie* had herself been at anchor; that the steamship *Zaanland* had negligently collided with her and broken her adrift; that the tide had carried her down on to the *Carbo I.*; and that the *Jessie* had done everything that it was possible for her to do to prevent that happening, but the collision was, so far as she was concerned, inevitable.

Upon this the plaintiffs joined the owners of the *Zaanland* as defendants and claimed against them in the alternative, alleging that the negligence of the *Zaanland* caused the *Jessie* to collide with the *Carbo I.*

The owners of the *Zaanland* admitted that the collision between the *Zaanland* and the *Jessie* was due to the negligence of the *Zaanland*, but denied that the collision between the *Carbo I.* and the *Jessie* was caused by the collision between the *Zaanland* and the *Jessie*, and said that it was due to the negligence of the *Jessie* in not avoiding the *Carbo I.*

The question I have to try is whether the plaintiffs have established their case against the *Jessie* or against the *Zaanland*, or, it may be, against both. It can hardly be, and was not really, suggested that a case has been established against neither. No doubt the trial, in this class of case, resolves itself into a struggle between the two defendants, each seeking to throw the blame upon the other. But it remains none the less a trial of the question whether the plaintiffs have established a case against both or against one and which of the defendants.

The evidence consists in the log of the *Carbo I.*, the chief officer's log and engineer's log of the *Jessie*, the evidence taken

before an examiner of four witnesses from the *Jessie*, and the bridge-book and engine-room log of the *Zaanland*. The evidence has to be considered together with the admissions in the pleadings.

The following facts are proved or admitted and are beyond question :—The *Carbo I.* was at anchor with her anchor lights duly exhibited ; the *Jessie* collided with the *Carbo I.* ; the *Jessie* was at the time of the collision in motion—I do not say under control, but in motion—and was carried by the tide down upon the *Carbo I.* ; and the collision between the *Jessie* and the *Zaanland* was due to the negligence of those on board the *Zaanland*.

A question of fact much debated between the *Jessie* and the *Zaanland* was as to the interval which elapsed between the two collisions. The log-books of the *Jessie* make it fifteen minutes, and the witnesses from the *Jessie* put it at the same, or at ten minutes. The conclusion, however, at which I have arrived, with the assistance of the Elder Brethren, is that the interval cannot have been anything like so long. The *Jessie* was anchored some 500 yards from the *Carbo I.*, which was astern of her, but somewhat on the starboard quarter. The tide, which was setting from the *Jessie's* position at anchor towards the *Carbo I.'s* position at anchor, was running at three to four knots, i.e., at a rate which would carry the *Jessie*, if free, to the *Carbo I.* in four to five minutes. The *Jessie*, which, when at anchor, was lying heading to the tide with 50 fathoms to her port anchor, was struck by the *Zaanland* in the port bow and knocked practically athwart the tide ; the brake of the windlass was broken and the port cable ran out, with the result that the tide drifted the *Jessie* to the length of the cable, some 70 fathoms or 140 yards, towards the *Carbo I.*, and after a momentary check the lashings of the cable parted, and the cable with its anchor was lost. This could only have taken a very short time—the witnesses put it at a couple of minutes—and the *Jessie* would then be only some 350 yards from the *Carbo I.*, in a tide which would carry her that distance in about three minutes. These considerations lead me to the conclusion that the interval between the two collisions cannot have been more than five minutes. I should add that the times in the log on which counsel for the *Jessie* rely are impossible

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times, at least so far as the engineer's log is concerned. If the engines were going full speed ahead for ten minutes the collision could not have happened, and if the ten minutes cannot be relied on, none of the times can be relied on.

The facts admitted and found are, then, these: The *Zaanland* by negligence breaks the *Jessie* adrift; some five minutes afterwards the *Jessie* collides with the *Carbo I.*; the *Carbo I.* is at anchor with proper lights. In my opinion these facts afford prima facie evidence in the plaintiffs' favour against both the *Zaanland* and the *Jessie*, and call on each of them to show that they were not negligent, or that, if negligent, their negligence did not cause or contribute to the collision. There is a prima facie case against the *Jessie*, because the *Jessie*, in motion, has collided with the *Carbo I.* at anchor. There is a prima facie case against the *Zaanland*, because the *Zaanland's* admitted negligence has set adrift the *Jessie*, and in a very short time the tide carries the *Jessie* on to the *Carbo I.* To meet that prima facie case it is said on behalf of the *Jessie* that she was not negligent; there was nothing she could do; she could not let go her starboard anchor; it was on the forecastle head and could only be let go if it could be lifted out by the crane and catfall, but two of the blocks of the catfall were broken by the first collision; and, further, if she had been able to let go the starboard anchor it would not have brought the *Jessie* up before she struck the *Carbo I.* Secondly, she put her engines full speed ahead within a couple of minutes, as soon as it was found that the starboard anchor could not be used, and put the helm hard-a-port to throw her stern clear, but before the collision could be avoided the tide carried her down on to the *Carbo I.* It is said, therefore, that once the *Jessie* was adrift the collision was inevitable, and it was the *Zaanland's* negligence which broke the *Jessie* adrift.

The *Zaanland* says that the *Jessie* ought not to have had the starboard anchor in such a position that it could not be let go at once (admittedly, even if the catfall was not damaged, it would take eight to ten minutes), and if it had been let go at once the second collision would have been avoided. Secondly, it is said that a timely use of the engines must have avoided the collision, for all that was needed was that the *Jessie* should travel forward about half her own length.

These contentions raise points upon which I have naturally to rely very much upon the advice of the Elder Brethren, and they advise me that when a ship like the *Jessie* is at anchor to a single anchor in a place like the Downs ordinary careful seamanship requires that the second anchor should be so placed that it can be let go at once if the necessity arises, and that it is contrary to such seamanship to have the anchor, as here, so placed that it must take eight to ten minutes to get it out; and that this rule of seamanship applies equally whether the ship at anchor has steam up or not. But they further advise me that supposing the starboard anchor to have been in such a position that it could be let go at once, and supposing it to have been let go at once, i.e., immediately the port anchor was lost, the utmost that can be said is that it might have avoided the collision; it cannot be affirmed that it would have avoided the collision.

As to the *Jessie's* engines, they advise me that a more instant use of the engines might have avoided the collision, but, having regard to the shortness of the time and the strength of the tide, it cannot be affirmed that it would have avoided the collision.

I accept this advice. But in applying it I must remember that some allowance must be made for those on board the *Jessie* in consideration that they had just been in collision with the *Zaanland*. Negligence implies a want of proper skill and care in the particular circumstances, and one of the circumstances is the fact that the *Jessie* is suddenly put in a position of difficulty by the fault of the *Zaanland*.

Having regard to all the circumstances, I hold that the *Jessie* was not negligent in not sooner using her engines. But I hold that the *Jessie* was negligent in carrying her starboard anchor as she did. If it had been carried out-board it could and would have been let go at once, and if it had been let go at once the collision might perhaps have been avoided.

The result of these considerations is that, in my view, the plaintiffs have established a case against each of the defendants, and neither has displaced that case. The *Zaanland* is to blame because her negligence set the *Jessie* adrift, and, in the existing circumstances of the *Jessie's* anchor, the collision with the *Carbo I.* was the consequence of the *Jessie* being set adrift. The *Jessie* cannot escape blame,

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because it has not been shown that the collision with the *Carbo I.* could not have been avoided even if the *Jessie* had not been negligent in the manner in which the starboard anchor was carried—that is to say, it has not been shown that, so far as the *Jessie* was concerned, the collision was inevitable. I therefore give judgment for the plaintiffs against both defendants.

I desire to add that I am deciding nothing as between the *Zaanland* and the *Jessie*. It may be that as between them the presumptions of fact are different, and the onus may be on the *Zaanland* to prove that the negligence of the *Jessie* in regard to the starboard anchor did contribute to the collision. That is not before me in this action, and I do not decide it. All that I am deciding here is as to the rights of the plaintiffs against the defendants, and not the rights of the defendants inter se.

Solicitors for plaintiffs: *Thomas Cooper & Co.*

Solicitors for defendants, the owners of the *Jessie: Botterell & Roche*, for *Botterell, Roche & Temperley, West Hartlepool.*

Solicitors for defendants, the owners of the *Zaanland: Clarkson & Co.*

E. C. T.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(In Prize.)

1917
April 17;
May 7, 8;
June 6.

THE RIJN.

[1917, No. 517.]

Prize Court—Cargo—Conditional Contraband—Transhipment from Enemy into Neutral Vessel—Named Consignee—Ultimate Enemy Destination—Order in Council of October 29, 1914—*Declaration of London*, 1909, *arts.* 35 *and* 43.

A cargo of cocoa beans shipped by a neutral firm in Ecuador on board a German vessel which took refuge on the outbreak of war at Las Palmas, was transhipped into the Dutch steamship *R.*, and bills of lading were made out whereby the beans were consigned to a neutral firm at Rotterdam.

By a Proclamation of August 4, 1914, foodstuffs were declared conditional contraband, but in November, 1914, His Majesty's Government gave the Dutch Government a list of foodstuffs to be dealt with as contraband which did not include cocoa beans. This list was not sent to Spain. On March 22, 1915, or the morning of March 23, His Majesty's Government communicated to the Dutch Government that Great Britain would give the August Proclamation its full effect as regards foodstuffs. The *R.* sailed from Las Palmas on March 23 about 4 P.M. on her voyage to Holland, and on April 6 the cargo was seized at Portsmouth as contraband destined for an enemy base of supply.

The cargo was claimed by the Dutch consignees, on whose behalf it was argued, first, that the goods were not contraband; secondly, that they could not be condemned as they were consigned to named consignees in a neutral port and therefore were within the protection of clause 1 (3.) of the Order in Council of October 29, 1914, modifying the Declaration of London (1); thirdly, that they could

(1) Clause 1 of this Order in Council provided that "during the present hostilities the provisions of the Convention known as the Declaration of London shall, subject to . . . . the modifications hereinafter set out, be adopted and put in force by His Majesty's Government."

Modification (iii.) was as follows: "Notwithstanding the provisions of art. 35 of the said Declaration, conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned "to order," or if the ship's papers do not show who is the consignee of the goods or if they show a consignee of the goods in territory belonging to or occupied by the enemy.'

Art. 35 of the Declaration provides that "conditional contraband is not liable to capture, except

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only be condemned, if at all, on payment of compensation under art. 43 of the Declaration of London (1); and, lastly, that the facts did not show the destination to be Germany :—

Held by the President (Sir Samuel Evans):

(i.) That the material time was the date of seizure when the goods undoubtedly were contraband, and that further, as the Proclamation of August 4, 1914, stood without any qualification as regards Spanish ports, the *R.* must be deemed to have been aware that cocoa beans, as foodstuffs, were on the contraband list before she left Las Palmas :

(ii.) That the exceptions made in the Order in Council of October 29, 1914, were only intended to operate in favour of bona fide neutral consignees in the business sense, and that a person who (as his Lordship found in the present case) acted merely as a conduit pipe to enable the goods to reach the enemy was not such a person as was intended by the expression "named consignee";

(iii.) That art. 43 of the Declaration of London only applies to neutral ships and neutral cargoes, and accordingly, the *R.'s* cargo being enemy cargo of a contraband nature destined for the enemy, it was subject to condemnation without compensation even if the *R.*, when she sailed from Las Palmas could have been deemed to be unaware of the declaration of contraband applying to the cargo.

APPLICATION by the Procurator-General on behalf of the Crown for the condemnation, as contraband, of a quantity of cocoa beans laden on board the Dutch steamship *Rijn*.

The facts, which are more fully stated in the judgment, shortly were as follows :—

In June, 1914, the German steamship *Assuan* sailed from South

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when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port."

[The Declaration of London Orders in Council were subsequently withdrawn by His Majesty's Government. See Maritime Rights Order in Council, July 7, 1916 (Stat. Rules and Orders, 1916, No. 452).]

(1) Art. 43: "If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation . . . . A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the Power to which such port belongs of the outbreak of hostilities or of the declaration of contraband respectively, provided such notification was made in sufficient time."

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America with a cargo of cocoa beans shipped by the Associacion de Agricultores del Ecuador and consigned to a German port. On the outbreak of war the *Assuan* took refuge at Las Palmas. In March, 1915, a portion of the cargo, namely, 15,550 bags of cocoa beans, was transhipped into the *Rijn*, which had been chartered by a Dutch firm, P. Onnes & Zoon, of Amsterdam, to carry the cargo to Holland. According to the bills of lading, dated March 23, 1915, the cocoa beans were shipped by the Associacion de Agricultores del Ecuador to the order of P. Onnes & Zoon at Amsterdam. In the course of her voyage to Holland the *Rijn* was diverted to Portsmouth, where the cargo was seized on April 6.

A claim was put forward by P. Onnes & Zoon, who alleged that they first heard of the cargo on the *Assuan* in January, 1915, from one George Otto Embden, of Hamburg, who proposed in a letter dated January 13 that the claimants should purchase the cargo "from the owners here," i.e. Hamburg, and that either the claimants should finance the transaction for themselves or that Embden should advance a sum up to 1,000,000 marks and take a five-eighths share in the cargo. It was alleged on behalf of the claimants that they and Embden proceeded to negotiate as to terms; that on January 26 three contracts were entered into under which a firm of Petersen & Paulsen, of Hamburg, bought the cocoa beans ex the *Assuan* on behalf of the claimants from three Hamburg firms who acted by the instructions and for the account of the Associacion de Agricultores del Ecuador; and that on January 31, 1915, it was agreed between the claimants and Embden that the latter should make advances in respect of the cocoa beans amounting to 1,066,551.49 marks out of a total of 1,707,375.05 marks, the balance to be paid by the claimants.

No evidence was adduced to show that the claimants paid for the goods, and it was admitted by them that the cargo on the *Assuan* had been insured against marine and war risks mainly with German companies; that by December 9, 1916, the underwriters had paid 497,250 guilders and 1,047,000 marks, the latter payment being made by German underwriters; and that it was in the interest of the underwriters that the claimants were defending the proceedings in the Prize Court.

As to whether cocoa beans were contraband the position was that

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as foodstuffs they became conditional contraband on the outbreak of war by Proclamation dated August 4, 1914. In November, 1914, however, His Majesty's Foreign Office gave the Dutch Government a list of foodstuffs which alone would be considered by Great Britain as conditional contraband. This list, which did not include cocoa beans, was not sent to Spain. The charterparty under which the *Rijn* was hired contained a clause that the cargo should be consigned to the Netherlands Overseas Trust. The Trust declined, however, as they regarded cocoa beans as goods which would not be treated as conditional contraband. The cargo was accordingly consigned to the claimants subject to a supplementary agreement to the charterparty dated February, 1915, whereby, if the cargo were to be declared conditional contraband, the claimants would at once transfer their consignment to the Trust. On March 22, or the morning of March 23, the Dutch Government was informed that the Proclamation of August 4, 1914, would be enforced without reservation. The *Rijn* sailed from Las Palmas at 4 P.M. on March 23. The claimants did not transfer the consignment to the Netherlands Overseas Trust prior to seizure.

April 17; May 7, 8. *Sir Frederick Smith, A.-G., Branson,* and *H. H. Joy,* for *Harold Murphy* (serving with His Majesty's Forces), for the Procurator-General. The cargo is conditional contraband; the effective date is the date of seizure, but even at the date of the transhipment into the *Rijn* the cargo was contraband, for all foodstuffs were on the conditional contraband list from the time of the outbreak of war so far as Spanish ports were concerned.

On the facts the contracts under which the claimants purport to be the owners of the cargo are a mere blind. The claimants lent their name to Embden in order that the whole cargo might go through to Hamburg. The claim is false and fraudulent, and that alone is a substantive ground for condemnation: *The Amiable Isabella* (1); *The Sydland and The Indianic.* (2) The consignee referred to in the Declaration of London Order in Council (No. 2) of October 29, 1914, means the real consignee in the commercial sense, and the doctrine of continuous voyage still applies if the named consignee is a mere conduit pipe: *The Sydland and The*

(1) (1821) 6 Wheaton, 1, 78. (2) See note on p. 161, post.

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Indianic. (1) The real consignee was Embden, and the actual owners at the time of seizure were the German underwriters, who cannot under any circumstances claim in the Prize Court: *The Palm Branch* (2); *The Gothland.* (3) [On the question of the transhipment of the cargo from an enemy vessel into a neutral vessel *The Jeanne* (4) was referred to.]

Sir Erle Richards, K.C., and *R. A. Wright*, for the claimants, Onnes & Zoon. When the goods were originally shipped in the *Assuan* they were neutral property, and, although they were subsequently transhipped into the *Rijn*, that is sufficient to distinguish the case from *The Jeanne* (4), where the goods were enemy property from first to last. In the present case the goods were laden on board the *Assuan* for sale in Germany on behalf of the neutral shippers and were at all times neutral property. The owners of the *Rijn* took every precaution against engaging in a transaction which by any possibility could involve the carrying of contraband to the enemy. They endeavoured to have the cargo consigned to the Netherlands Overseas Trust, and the reason the Trust did not accept the consignment was because cocoa beans were not on the contraband list, and the suggested precaution was therefore unnecessary. The shippers at Las Palmas could not have been aware that either on the day before or on the very day the *Rijn* sailed from Las Palmas Great Britain had altered the contraband list. The cargo, therefore, ought not to be treated as contraband. But, even if the cargo was contraband at the date of seizure, art. 43 of the Declaration of London applies, and, the ship having sailed without notice that the cargo was contraband, even if destined for Germany, which this cargo was not, it can only be condemned on payment of compensation. In *The Katwijk* (5), where the condemned cargo was on the free list when the ship sailed, although on the contraband list at the date of seizure, the owners of the cargo did not appear, and therefore no question of compensation arose. The goods in the present case were consigned under the bills of lading to named consignees, Onnes & Zoon, and therefore under clause 1 (3.) of the Order in Council of October 29, 1914, which restores art. 35 of the Declaration

(1) See note on p. 161, post.
(2) [1916] P. 230.
(3) [1916] P. 239, n.
(4) Ante, pp. 8, 9, n.
(5) [1916] P. 177.

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of London, are not within the doctrine of continuous voyage. *The Sydland and The Indianic* (1) was quite a different case. In that case the Court was not dealing with a consignment to neutral merchants of repute—the so-called consignee was a mere dummy; the Court should not inquire whether a neutral consignee has contracted with merchants in Germany to give them some interest in the cargo; such an inquiry is irrelevant, inasmuch as to condemn goods on such ground would do away with the exception as to named consignees and render nugatory this provision expressly made to protect neutral trade.

MacKinnon, K.C., and *Lewis Noad*, for the shipowners in respect of freight and damages for detention.

[It was agreed in the course of the hearing that the claim for detention should be disallowed and that the claim for freight should be referred to the Registrar.]

Branson, in reply. Art. 43 of the Declaration of London only protects neutral vessels against the consequences to them of the condemnation of a cargo which they were unaware was contraband; it does not apply to the cargo itself.

[THE PRESIDENT (SIR SAMUEL EVANS). *The Sorfareren* (2) is against you on that point.]

In any event the article has no application in the present case, for the cargo was contraband in Spanish ports long before the transhipment took place, and, further, the cargo at all material times was enemy property as well as destined for the enemy.

Cur. adv. vult.

June 6. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—The cargo comprised in this claim consisted of 15,550 bags of cocoa beans. It has been sold, and realized over 87,000*l.* When it was seized it was laden on the Dutch steamship *Rijn*. She was then on a voyage from Las Palmas to Amsterdam. She sailed from Las Palmas on March 23, 1915. The ship was diverted to an English port in the English Channel on April 1; and the formal seizure was on April 6.

The cargo had been transhipped at Las Palmas from a German vessel, the *Assuan*, one of the Kosmos Linie. It was originally shipped

(1) See note on p. 161, post. (2) (1915) 1 Br. & Col. P. C. 589.

in South America in June, 1914, by the Associacion de Agricultores del Ecuador for a German port. The bills of lading and shipping documents for that intended voyage were not produced at the hearing. At the outbreak of war the ship took refuge at Las Palmas. For seven or eight months the shippers, the Associacion de Agricultores del Ecuador, do not appear to have done anything in relation to the valuable cargo held up in the self-interned ship in the Canaries.

It was part of the case for the claimants that the goods were sent to agents in Germany for sale on behalf of the shippers, and that when the *Assuan* put into Las Palmas for safety from capture the cargo still belonged to the neutral shippers, and that it remained in them until the transhipment on the *Rijn*, or at any rate until the property became transferred by the alleged sale to the claimants in January, 1915. No evidence was given of any communication, direct or indirect, between the Associacion de Agricultores del Ecuador and any alleged agents in Germany or elsewhere with reference to the cargo for the long period of nearly three years—from the date of shipment up to the hearing in Court, about a month ago. It did not appear that they took any part in the arrangement for the transhipment of the goods on to the Dutch vessel. The Court was not informed whether they approved of the transhipment, or of the alleged sales, or whether they were ever advised of them before or since. Whether they have been paid for the goods or any of them, and if so when, how, and by whom, or whether they still hope or expect to be paid, whether they have any knowledge of these proceedings or any interest in the result of the present claim, are matters which are left in mystery. Having regard to the fact that the goods were originally consigned to Hamburg, that they were laden on a German vessel, that they were kept in that vessel for many months lying in refuge in a neutral port, that the important evidence already adverted to was not produced, that the person who introduced the business to the claimant described the German firms who made the contracts of sale as "the owners here" (namely, Hamburg), and to all the other facts which have come before the Court, I cannot assume or find in the claimants' favour that the ownership in the goods had remained in the neutral shippers up to the time of the alleged sales or transhipment.

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The President.

The first ray of light shed upon the cargo in the German vessel at Las Palmas was introduced by the appearance upon the horizon of one George Otto Embden, of Hamburg. No information was vouchsafed to explain how he learnt of or became interested in the interned cargo.

Michiel Onnes van Nyenrode, trading as P. Onnes & Zoon, of Amsterdam (the claimants) has sworn that the first he heard of the cargo was at an interview with Embden at Hamburg in January, 1915. (There was another partner in P. Onnes & Zoon, but the gentleman already named transacted all the business relating to this matter, and I shall call him and the claimants " Onnes " for the sake of brevity.)

The next circumstance was that he found at his office at Amsterdam on his return from Hamburg the letter which is the first recorded step in the history of the present claim.

It is dated January 13, 1915, and is as follows :—

" Dear Mr. Onnes,—I should like to propose to you to-day a large remunerative business. It is a question of about 15,000 bags of Arriba cocoa, which are at Las Palmas in the steamer *Assuan* and which could be probably purchased from the owners here at 70 pfennige per pound ex Las Palmas. To that would be added about 5 per cent. general average charges which the purchaser must bear.

" You will be able to arrange the freight from Las Palmas at yours, or via Lisbon at 3—4 pfennige per pound and the marine and war insurance at about 3 per cent., so that the cocoa would come out at about 80 pfennige c.i.f. Holland. The present value is about 65—68 cents there ; the sum concerned amounts to about 1,400,000 marks. Perhaps you can arrange the financing at yours wholly or partially with your banks or with the Waren-Liquidations-Kasse. If you should arrange the whole of the financing at yours, I should claim a quarter of the profit for bringing the business to you ; if you do not succeed in arranging the financing at yours, I should, contingently, be willing to finance the business for you up to an amount of 1,000,000 marks, but in such case I want at least five-eighths share, as I must renounce participating in the profit. I would purchase the cocoa here for your account. The payment would have to be made against delivery of the bills of lading for

cash less 1 per cent. or net cash against three months bank acceptance.

. . . . . .

"I am, &c.,

"(Signed) George Otto Embden.

"Perhaps a further quantity will be purchaseable."

I have already noted that the proposed sellers are described as "the owners here"—i.e., at Hamburg. Onnes seems to have gone to Hamburg again later, because on January 23 Embden writes to him this letter, which is headed "To be delivered by express messenger" (unless an express messenger was sent from Hamburg to Amsterdam):—

"Referring to our conversation during your stay here I confirm to you that I am willing to grant you a credit up to 1,000,000 marks (1 million reichmarks) to carry through the cocoa business ex the steamer *Assuan* under the following conditions:—

"Beyond interest at 7 per cent. for the money lent by me I am to receive a participation in the net profit, after deduction of all expenses, of five-eighths (in which Mr. C. Z. Thomsen participates to the extent of one-quarter).

"The negotiations for effecting the business are progressing. I await your confirmation."

The answer to this letter was dated Amsterdam, January 28, 1915. This will be set out hereafter. Several remarkable things arise in reference to that answer, and to what happened before it was sent.

For it appears that in the interval—namely, on January 26—three separate contracts had been made whereby Petersen & Paulsen, of Hamburg, purported to have bought the cargo of cocoa beans for Onnes in different quantities from three Hamburg firms, Schlubach, Thiemer & Co., Schroder Gebrüder & Co., and Behrens & Söhne, described as public trading companies. Some of them appear to act as bankers. The names are not unfamiliar to the Court in connection with German trade and prize proceedings. No explanation was given of how each of the firms came to act as agents for the same principals for different parts of the same cargo, and on the same date. The three contracts are all in identical forms. They can be referred to for their terms. They all purport to be made "by

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instructions and for account of the Associacion de Agricultores del Ecuador." The provision as to payment was :—" Payment : Wholly or partially cash, less 1 per cent. rebate, or three months first class bank acceptance against delivery of the documents, due (as to two) 1st February current year, and (as to the third) due 15th February current year."

The clause as to insurance was :—" Insurance : The policies are to be delivered therewith as they now stand."

The final clause in each contract was a remarkable one, of which no explanation was given. It ran as follows :—" This contract must be kept secret from everybody."

No communication of any kind passing between Onnes and Petersen & Paulsen was produced. Indeed, no instructions from Onnes to Petersen were ever mentioned at the hearing ; nor was any explanation given of how, or where, or by whom, or on what terms they were authorized to act for Onnes. If I remember aright no reference to that firm is made in the many affidavits made by Onnes in the course of the proceedings.

According to the claim filed, Onnes asserts that he bought the goods on January 26, 1915. According to his first affidavit, he says that he purchased from the three Hamburg firms already named, " who, as he saw *afterwards* from the contracts dated January 26, 1915, acted for the South American house, the Associacion de Agricultores del Ecuador."

The invoices are dated from Hamburg, as follows :—From Schroder Gebrüder & Co., January 27 ; from Behrens & Söhne, January 29 ; from Schlubach, Thiemer & Co., February 10, 1915. The copy of the last invoice which was supplied to me made no reference to the Associacion de Agricultores.

The charterparty by which Onnes hired the ship was dated at Amsterdam on January 27, 1915.

Then came the answer of Onnes (already mentioned) dated January 28, 1915, to Embden's letter of January 23, introducing new terms and figures in a way which required some explanation ; but no explanation was given. [His Lordship read the letter, which stated that Onnes accepted Embden's proposal to make a cash advance of 1,000,000 marks at 7 per cent. interest and $\frac{1}{4}$ per cent. commission per month, and continued :]

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The reply of Embden, also headed "to be delivered by express messenger"—omitting formal parts—was:—

"I received your favour of the 28th inst., and in accordance with your instructions I will make the following payments on the basis of the credit opened for you of 1,000,000 marks—for the cocoa business ex s.s. *Assuan*:—

	Marks.
On the 1st February, current year..	952,905.67
And on the 15th February, current year	113,651.82
Total marks	1,066,557.49"

The various affidavits of Onnes did not disclose, nor did any evidence in the case disclose or suggest, that Onnes and Embden had any interview at Hamburg other than one, which apparently was early in January before the receipt by Onnes of Embden's letter of January 13, which he "found at his office when he returned from Hamburg."

No evidence was given to satisfy me that any payment was made by Onnes for the goods, either to the three German firms mentioned, or to Embden, or to the association. In the first affidavit of Onnes, sworn on August 23, 1915, he deposed that the goods were "bought and paid for when lying in the *Assuan*." He does not say whether by cash or three months' acceptance, or how, or when, or to whom. Nothing could have been easier than to have given the usual business proof of payment if payment had been made in the ordinary course of business. It appears to me significant in this connection also that in three notarial declarations made on behalf of the three German firms on November 27, 1915, the sale is declared, but there is no mention of any payment.

To proceed with the history of the cargo, the chartered vessel *Rijn* in due course proceeded to Las Palmas, and the cocoa beans were transhipped from the German to the Dutch steamer, and the latter sailed for Amsterdam on March 23. The master, however, had orders to call at the Hook of Holland for instructions as to whether the discharge should be at Rotterdam. These were not given by Onnes. The shippers' agents at Las Palmas were the Woermann Linie, who acted for the Kosmos Linie. They were German companies. They no doubt got the order from Embden.

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On the ship's voyage she was met by a British cruiser, diverted, and the cargo formally seized on April 6.

The main contentions of counsel for the claimants were—(1.) that the goods were not contraband: (2.) that they could not be seized as they were consigned to named consignees in a neutral port within the meaning and protection of the Order in Council of October 29, 1914, modifying the Declaration of London; (3.) that they could only be condemned, if at all, on payment of compensation under art. 43 of the Declaration of London; and (4.) that the facts did not show the destination to be Germany.

I must now set out certain facts relating to the question whether the cocoa beans were or ought to be treated as contraband. Cocoa beans are, of course, foodstuffs. They were accordingly among the class of goods declared to be conditional contraband as far back as August, 1914. That was a declaration not only to the enemy, but to all neutral countries. For some reasons of State, however, our Foreign Office in November, 1914, gave the Dutch Government at the Hague a list of foodstuffs which would be dealt with as conditional contraband, which did not include cocoa beans. This was not sent to all European neutral countries. As to Spain, the Declaration of August, 1914, stood without any qualification. Accordingly, having regard to the provisions of art. 43 of the Declaration of London, the *Rijn* would be deemed to be aware that cocoa beans as foodstuffs were on the contraband list before she left Las Palmas, and, indeed, before she began to receive the transhipped cargo. But as to Holland, it was not until March 22, or perhaps the morning of March 23, 1915—the day when the *Rijn* sailed from Las Palmas —that it was communicated to the Dutch authorities that this country would act so as to give the Declaration of August, 1914, its full effect as regards foodstuffs.

The owners of the vessel acted with strict neutral correctitude. They insisted on a clause in the charterparty that the cargo should be consigned to the Netherlands Overseas Trust. The Trust, however, would not assent to become consignees as they regarded cocoa beans as goods which would not be treated as contraband. This led to the consignment being made to the claimants, but subject to a supplemental agreement, dated February 9, 1915, whereby if the cargo were to be declared conditional contraband the claimants

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would at once transfer their consignment to the Trust. This was not done before the seizure. The Netherlands Overseas Trust are deserving of every confidence. But it is well known that in Scandinavian countries provisions and guarantees against re-exportation into Germany have constantly been evaded and broken. It was the shipowners in the present case who were anxious to make it clear that their ship was only engaged to carry the cocoa beans to Holland for consumption there, and not for exportation into Germany. That is shortly the course of events.

Was the cargo conditional contraband at the material time? The material time was the date of seizure; and whatever view may be taken of the information given to the Hague authorities and by them to the shipowners, or of the knowledge attributable at the Canaries, it cannot be doubted that the goods when seized were conditional contraband. Art. 43 of the Declaration of London so far from supporting the first main contention of the claimants is obviously opposed to it. It in fact speaks of goods declared contraband while on the high seas without the knowledge of the parties concerned as, "the contraband"—although it provides that "the contraband" should only be condemned on payment of compensation. The comment of M. Renault is to the same effect. He says that the provision was intended "to spare neutrals who might, in fact, be carrying contraband but against whom no charge could be made," and he adds that "while it would be unjust to capture the ship and condemn the contraband, on the other hand, the cruiser cannot be obliged to let go on to the enemy goods suitable for use in the war of which he may stand in urgent need." (1) Art. 43 clearly was not intended to take out of the category of contraband goods which by reason of their quality had been included in the list. The first main contention of the claimants therefore fails.

The next question which arises is whether the claimants can invoke art. 43 and claim the benefit of compensation under that article. This is a question of law and of fact.

As to the law, I think it is clear from the terms of the article and of the comment that it was only intended to comprehend

(1) See General Report presented to the International Naval Conference on behalf of its Drafting Committee (Parliamentary Paper "Miscellaneous No. 4 (1909)," pp. 51, 52).

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neutral ships and cargoes; i.e., it applies only to ships of neutrals innocently carrying cargo which turned out in fact to be contraband, and to cargo of neutrals which was in fact contraband and was innocently laden and carried on a neutral ship. If the cargo was contraband, both an enemy ship carrying it and the cargo to whomsoever it belonged would be subject to capture and condemnation, and an enemy cargo on a neutral ship would also be similarly subject, notwithstanding the Declaration of Paris. Questions of fact arising under the article will be considered and determined later in connection with various other matters, such as ownership, conduct, destination, and title to claim.

The next contention of the claimants to be considered is whether they are protected by the Order in Council of October 29, 1914. This again involves law and fact.

As to the law, in my opinion the exceptions made in clause 1 (3.) of the Order were only intended to operate in favour of bona fide neutral consignees. This is the conclusion I have come to both on consideration of the language of the Order itself, and from what is known from public despatches between this country and America as to its history. I also adhere to what I have said in other cases that a named consignee is a bona fide consignee in the ordinary business and commercial sense, and that a person who acts merely as a conduit pipe or channel for the purpose of enabling the goods to reach the enemy direct, and who merely lends himself or his name as an intermediary or instrument for that purpose, whether for great, small, or no remuneration, is not such a person as was intended by the term "named consignee." A sham or dummy consignee, although an existing person, is not such a person as was contemplated by the Order. The facts under this head will be the same as those found in connection with art. 43.

In order to deal with the final contention for the claimants, and to ascertain the facts material to the other contentions, it is necessary now to proceed upon a further investigation of the position, relationship, and conduct of Onnes and Embden, and of the facts generally. [His Lordship then proceeded to read two telegrams which passed between Onnes and Embden and a letter from the latter to Onnes, which his Lordship described as being "as significant as it was daring." It contained the following passage: "If

England will release the *Rijn* only if the cargo is reconsigned to the Overzeetrust, you must undertake the business of reconsigning it and get the captain to warn you of the exact hour when he leaves the port in which he is interned. I will then go to Berlin and try and induce our Government to allow the *Rijn* to be brought into Zeebruge by putting it to them that we are dealing with a cargo sold to Germany which cannot be carried to its place of destination on account of its reconsignment to the Overzeetrust, effected at the desire of England. I cannot to-day say whether the naval staff will accede to my request; but there is a prospect of their doing so. In the meantime it is necessary that we should be informed when the *Rijn* can sail again so as to be able to receive her at the proper time." [His Lordship continued as follows:]

After the letter was disclosed by the Procurator-General, an attempt was made to explain it by Onnes in his affidavit of March 30, 1917, which is not particularly successful. He attributes the suggestions of Embden contained in it (which he calls "objectionable, and in fact criminal") to "the abnormal mental condition of the so-called war psychose which he knew at the time prevailed amongst the Germans," and to the "overstrained nerves" of Embden, "particularly in those days, when he expected every day to be called in as a soldier." He says he paid no attention to it. Whether he resented it in any reply I do not know. He denied that Embden had proposed or suggested to him that in order to obtain the release of the cargo it should be reconsigned to the Netherlands Overseas Trust. But a few days afterwards he certainly approached the Trust with that view, as appears from the letter of the Trust to his lawyer of April 16.

After the writ was issued and the appearance was entered, the first formal step taken by Onnes in the proceedings was the making of a declaration before the British Consul at Amsterdam on May 18, 1915, in which he said the cargo had become the full property of his firm to the exclusion of all others, and that it had continued to be so up to the moment that he abandoned the goods to his underwriters under the stipulations of the policy.

This leads me to state the facts, so far as they have come to the knowledge of the Court, with regard to the insurances on the goods.

In an affidavit sworn on December 8, 1915, Onnes disclosed nine

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policies of insurance, with a note appended "that other policies of insurance have been paid off and are no longer in my possession." In a later affidavit he said he could not set out a complete list of the insurances which had been paid off and had passed out of his possession, and added: "These policies were for the most part contracted in Hamburg with German insurance companies." The total sum insured by these policies amounted to 1,880,000 marks. Finally, he stated that 497,250 guilders and 1,470,000 marks had been paid, and the latter on the German policies—making altogether over 2,250,000 marks. The total amount of the three invoices were 1,734,702 marks, and these included 1850 bags which were not laden on the *Rijn*. The value of the objects sold, according to the three declarations of the alleged agents dated November 27, 1916, was 1,100,000 marks. The claimants therefore make out that considerably more than the value of the goods have been paid by the underwriters. Onnes states in terms in his last affidavit: "It is the interest of the underwriters I am defending in the Prize Court." It was faintly suggested that an order might be made for an inquiry to ascertain what portion of the insurances may have been paid by neutral underwriters; but, as I have said in other cases, the Prize Court will not embark on any such inquiries.

A short reference may be made to the accounts, or rather absence of accounts, kept by the claimants. Copies of a few book entries were produced said to relate to some part of the transaction; but they were unintelligible and inexplicable to the claimants' own counsel. There are no accounts as between the claimants and Embden, or Schlubach, Thiemer & Co., or Schroder Gebrüder, or Behrens & Söhne, or the association, or any of the underwriters.

I have stated the facts fully.

It now remains to state the conclusions which I have formed, namely:—(1.) No satisfactory evidence has been given to show that the property in the goods was in neutrals at the time of the transhipment. The inference I draw is that the goods had before that time become the property of some consignees in Germany. (2.) The claimants have failed to establish that the property in the goods ever became vested in them, or that they are or ever were the owners. (3.) If, however, the property had become vested in them they acted in the whole transaction merely as instruments for

Embden, and subject to his directions, for the purpose of getting the goods through to Germany. (4.) The real owner of the goods at the time of seizure was Embden of Hamburg. (5.) The intended destination of the goods when they left Las Palmas was Hamburg, an enemy base of supplies. (6.) The claimants acted in concert with Embden in an attempt to get the goods to Hamburg by pretending that they were neutral purchasers on their own account, and also acted in concert with him in putting forward a false claim before this Court. (7) Even assuming that the legal title to the goods had passed to the claimants, they would not be entitled in the circumstances to any protection under the Order in Council of October 29, 1914, or to any compensation under art. 43 of the Declaration of London. (8.) Even assuming that the claimants were genuine neutral purchasers of the goods they had parted with the property in them by abandonment to the underwriters, who were mainly Germans. (9.) According to the claimants' own case, if the goods or their proceeds were released, the underwriters would be entitled to the proceeds, or to any compensation under the article referred to.

Any one of the above grounds would be sufficient to bar the claim. I therefore disallow it with costs.

I condemn the goods seized, being conditional contraband destined for an enemy base of supplies, and their proceeds as good and lawful prize.

Leave to enter an appeal within two months; security 400l.

Solicitor for the Procurator-General: *The Treasury Solicitor.*
Solicitors for the claimants Onnes & Zoon: *Botterell & Roche.*
Solicitors for the shipowners: *W. A. Crump & Son.*

NOTE.—In THE SYDLAND AND THE INDIANIC [1915, Nos. 587 and 610] the Crown claimed the condemnation of 2814 bags of coffee laden on two Swedish vessels and consigned under bills of lading dated April 26 and 29, 1915, by a New York firm, Herklotz Corn & Co., to Oscar Wadstrom & Co. at Gothenburg. The two consignments were claimed by Oscar Wadstrom & Co. on behalf of one F. Alamo, a Mexican citizen, and the case made was that the coffee had been consigned by Herklotz Corn & Co. to Wadstrom & Co. for sale on behalf of Alamo. The case for the Crown, on the other hand, was that the goods were sent by

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Herklotz Corn & Co. through Wadstrom & Co. to a Hamburg firm Wilhelm Boesch G.m.b.H., and were the property of the latter.

1916. July 31. THE PRESIDENT (SIR SAMUEL EVANS), after reviewing the facts, said: "As to the claim put forward by or in the name of Alamo as neutral owner of the goods, there is no evidence of any value to support it. The onus of proving a neutral interest rests in the claimant. My conclusion is that the claim is entirely devoid of foundation, and it must be disallowed. That is enough to dispose of the case. There is no other claimant before the Court, and the goods can be condemned: see Prize Rules and *The Schooner Adeline.* (1)

"Proceeding to another view of the case, I am satisfied that the real owners of the goods at the time of seizure were Wilhelm Boesch G.m.b.H., of Hamburg, and that Wadstrom knew this perfectly well. Wadstrom & Co. therefore undertook the assertion of a false claim, and the assertion of a false claim by persons who were agents of the real owners, or who acted in contrivance with them, is enough to lead to condemnation: *The Amiable Isabella.* (2)

"Some questions were argued in the case upon the hypothesis that enemy owners were the claimants of the goods. With these I will deal quite briefly. In the first place it was contended that coffee was not conditional contraband. This depends upon whether coffee is food and included in the term 'foodstuffs' in the material contraband Proclamation. I will not repeat what I said in the course of the argument. Coffee, in my opinion, is food, and is covered by the description 'food-stuffs.' It also forms part of the regular rations of the German and Austro-Hungarian armies.

"It was further contended that the coffee in question being consigned to named consignees, namely, Oscar Wadstrom & Co., was immune from seizure or capture under the operation of the Order in Council of October 29, 1914, adopting with modifications art. 35 of the Declaration of London. It is not easy to determine now the effect of Orders in Council purporting to adopt single provisions of the Declaration of London, which by its terms could not be ratified unless it was adopted in the whole. But, assuming the Order in Council of October 29, 1914, to be valid in this regard, I repeat the opinion I have expressed in other cases, that the named 'consignee' must be a real and genuine consignee in the business and commercial sense. The fact that a person who happens to be in existence is named, if he be merely a nominee without any interest, or dummy consignee, is not enough. A cargo of conditional contraband might be consigned according to the ship's papers, to an existing person having a Christian and a surname, who might be the town crier or the gravedigger, of a particular locality. But if he was not concerned bona fide as a commercial consignee, however substantial his existence in the flesh might be, and he was only used as a name, or as a conduit pipe or channel for the transmission of goods through a neutral port to enemy merchants, he would not be a 'named consignee'.

(1) (1815) 9 Cranch, 244. (2) 6 Wheaton, 1, 78.

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within the meaning and tenor of the Order in Council referred to. On this aspect of the case, if it were necessary to decide it, I should pronounce that the goods seized were the property of Wilhelm Boesch G.m.b.H., of Hamburg; that the doctrine of continuous voyage applies; that their ultimate destination was Hamburg; and that, being conditional contraband destined for Hamburg (a garrison town, and a base of supplies for the German Army), they are subject to condemnation.

"The judgment of the Court is that the claim of the claimants is disallowed; and, further, that the goods or their proceeds must be condemned as good and lawful prize."

E. C. T.

[IN THE COURT OF APPEAL.]

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DOROTHY FRANCES PLUMMER, INTERVENER.

Marriage—Validity—Marriage by Licence before Registrar—"Due notice"—False Statements in Notice—Petition for Nullity—Omission to state Birth of Issue—Decree nisi—Intervention of Child—Appeal—Marriage Act, 1836 (6 & 7 *Will.* 4, *c.* 85), *ss.* 4, 42—*Marriage and Registration Act*, 1856 (19 & 20 *Vict. c.* 119), *ss.* 2, 3, 17, 18, 19—*Matrimonial Causes Act*, 1907 (7 *Edw.* 7, *c.* 12), *s.* 3—*Perjury Act*, 1911 (1 & 2 *Geo.* 5, *c.* 6), *ss.* 3, 17.

In the case of a marriage by licence before a superintendent registrar under the provisions of the Marriage Act, 1836, and the Marriage and Registration Act, 1856, although the notice or declaration required by the Acts may contain false statements to the knowledge of both parties, the marriage will nevertheless be valid.

There is no analogy between the case of a marriage by banns or on notice before a registrar and that of a marriage by licence. In the former the main object is publicity; in the latter identity.

Dictum of Lord Penzance in *Holmes* v. *Simmons* (1868) L. R. 1 P. & M. 523, 529, considered.

In re Rutter [1907] 2 Ch. 592 approved.

In order to keep her marriage secret from her father, whose consent was necessary, a minor was married by licence before the registrar in a false name, the previous statutory notice under the Marriage Act, 1836, s. 4, being false to the knowledge of both parties in this and other respects. A petition was subsequently presented by the husband for nullity of marriage based on the above facts. The petition was not defended by the wife, and a decree nisi was granted by Bargrave Deane J. There was

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one child of the marriage, an infant, but her birth was not stated in the petition. The child subsequently obtained leave to intervene in the suit under s. 3 of the Matrimonial Causes Act, 1907, and to appeal against the decree nisi. On appeal:—

Held, that the marriage being by licence was not invalidated by reason of the false statements in the notice, and that the appeal must therefore be allowed, the decree rescinded, and the petition dismissed.

Decision of Bargrave Deane J. reversed.

APPEAL from a decision of Bargrave Deane J.

On June 7, 1915, Albert William Plummer presented a petition praying for a decree that the ceremony of marriage celebrated between him and Rose Elizabeth Loveday was null and void. By his petition he alleged (inter alia) (paragraph 1) that on August 24, 1903, at the register office in the district of Fulham in the county of Middlesex a ceremony of marriage took place between the petitioner and one Rose Elizabeth Loveday; (paragraph 2) that the ceremony of marriage took place by virtue of the licence of the superintendent registrar of the district; (paragraph 3) that the licence was granted upon certain information furnished to the superintendent registrar by the petitioner and Rose Elizabeth Loveday; (paragraph 4) that at the time of the giving of such information as in the last paragraph mentioned the true name of Rose Elizabeth Loveday was not disclosed to the superintendent registrar but was falsely given as Rose Elizabeth Findlow; (paragraph 5) that whereas William Charles Loveday, the father of Rose Elizabeth Loveday, was then alive, the name of the father was given as William Charles Findlow and he was stated to be deceased; (paragraph 6) that these false particulars as set out in paragraphs 4 and 5 were given knowingly and wilfully by the petitioner and Rose Elizabeth Loveday to the superintendent registrar; and (paragraph 7) that the false particulars were duly published by the superintendent registrar and after such publication the ceremony of marriage took place at the time and place aforesaid.

No answer to the petition was filed by the wife, and the suit came on for hearing as an undefended cause before the Court itself on June 20, 1916, when a decree nisi of nullity was pronounced by Bargrave Deane J.

There was one child of the marriage, Dorothy Frances Plummer,

who was born on June 1, 1904. She was not made a party to the suit, nor did she intervene before the suit was heard, nor was the fact of her existence mentioned in the petition.

On December 15, 1916, an order was made assigning the Official Solicitor as guardian ad litem of the infant for the purpose of presenting a petition under the Legitimacy Declaration Act, 1858, for a declaration of her legitimacy, and on the same day a petition was duly lodged.

On December 28, 1916, the King's Proctor intervened, and by his plea prayed that the Court should deal with the case by reversing the decree nisi.

On May 1, 1917, upon the application of the Official Solicitor, an order was made that the infant should have leave to intervene forthwith in the suit pursuant to the provisions of the Matrimonial Causes Act, 1907.

On May 14, 1917, the Court of Appeal, on the application of the infant, granted her leave to enter an appeal by her guardian ad litem against the decree nisi notwithstanding that the time for so doing had expired.

On May 18, 1917, notice of appeal was duly served and the appeal set down.

The appeal was heard on June 5, 1917.

Hollis Walker, *K.C.*, and *Stuart Bevan*, for the appellant. The marriage in this case was regulated by the Marriage Act, 1836 (6 & 7 Will. 4, c. 85). By s. 4 of that Act in every case of marriage intended to be solemnized in England according to any form authorized by the Act, "one of the parties shall give notice under his or her hand . . . . to the superintendent registrar of the district within which the parties shall have dwelt for not less than seven days then next preceding . . . . and shall state therein the name and surname and the profession or condition of each of the parties intending marriage, the dwelling place of each of them, and the time, not being less than seven days, during which each has dwelt therein, and the church or other building in which the marriage is to be solemnized." By s. 5 the superintendent registrar is to file all such notices and enter copies thereof in a book which is to be open for inspection without fee. By s. 8 certificates for marriage

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by licence are to be distinguishable from other certificates. By s. 9 the issue of the superintendent's certificate may be forbidden, Sect. 11 empowers the superintendent registrar to grant licences for marriage. Sect. 42 renders marriages void if unduly solemnized with the knowledge of both parties. Sect. 43 (repealed by the Statute Law Revision Act, 1874 (37 & 38 Vict. c. 35)) imposed penalties in the case of "any wilfully false notice, certificate or declaration." By the Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 2, every notice of marriage is to be accompanied by a solemn declaration by one of the parties that there is no lawful impediment to such marriage. Sect. 3 prescribes the form of notice of marriage. Sect. 17 deals with the evidence of marriages solemnized under the recited Acts and that Act, and provides (inter alia) that it shall not be necessary in support of such a marriage to prove the consent to any marriage having been given by any person whose consent thereto is required by law. Sect. 18 imposed the penalties of perjury on any person who should knowingly or wilfully make any false declaration or sign any false notice required by the Act. That section is repealed by s. 17 of the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), but its provisions are re-enacted by s. 3 thereof. Sect. 19 imposes, in the case of a valid marriage had under the provisions of the Acts "by means of any wilfully false declaration, notice, or certificate made or obtained by either party to such marriage as to any matter in which a solemn declaration, notice, or certificate is required," the penalty of forfeiture of all the estate and interest in any property accruing to the offending party by such marriage.

The question in this case is whether the "due notice" required by s. 42 of the Act of 1836 means accurate notice. By the Marriage Act, 1823 (4 Geo. 4, c. 76), s. 22, "if any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special licence as aforesaid, or shall knowingly and wilfully intermarry without due publication of banns or licence from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void

to all intents and purposes whatsoever." Under that section it was held that " without due publication of banns " meant without due publication of the banns in the real names of the parties. *Bevan* v. *M'Mahon* (1) shows that there is a great distinction between marriage by banns and marriage by licence. It was there held that a marriage by licence would not be invalidated if a person was married in a false name if she was in fact known by it, but that it would be otherwise in the case of a marriage by banns after a publication in such an altered name under such circumstances. There is no analogy between a marriage by banns and a marriage by notice before the registrar. The main object of banns is to secure publicity, whilst that of a licence is identity. The decisions as to what constitutes undue publication of banns under the Marriage Act, 1823, are not therefore applicable to a question of what constitutes undue notice under the Marriage Registration Acts: *Holmes* v. *Simmons* (2); *Prowse* v. *Spurway*. (3) The case is governed by the decision of Swinfen Eady J. in *In re Rutter*. (4) There in order to keep her second marriage secret a widow was married before a registrar in her maiden name, the previous statutory notice under the Marriage and Registration Act, 1856, s. 3, being false to the knowledge of both spouses in this and other respects, and it was held that the marriage was valid.

[LORD COZENS-HARDY M.R. Was that case cited to Bargrave Deane J. ?]

No. It is submitted, therefore, that at all times the distinction between marriage by banns and marriage by licence has been recognized. In the case of a marriage by banns a misdescription in the notice renders the marriage null and void under s. 22 of the Act of 1823. In the case of a marriage by licence no such result follows, the object of banns being to secure publicity and that of licence identity. The marriage, therefore, was not rendered invalid by reason of the wife being married in the name of Findlow instead of her real name of Loveday.

Sir Gordon Hewart, *S.-G.*, and *R. F. Bayford*, for the King's Proctor, adopted the same argument.

(1) (1861) 30 L. J. (P. M. & A.) 61.

(2) L. R. 1 P. & M. 523.

(3) (1877) 46 L. J. (P. D. & A.) 49.

(4) [1907] 2 Ch. 529.

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McCall, K.C., and *W. Austin Metcalfe*, for the respondent petitioner. The decision of Bargrave Deane J. was right. The rule is accurately stated in Rayden on Practice and Law in the Divorce Division, p. 39, s. 29, as follows: "It is not necessary that the status of the parties should be correctly described; and if a party is described by a false name or address, and the banns are consequently incorrectly published, the marriage is not necessarily invalidated: if a wrong Christian name or surname is given by inadvertence, without any intention of concealment, or if the name given is one which has been acquired by adoption or reputation, the inaccuracy is immaterial; and even if a false name and address are given by one of the parties fraudulently, with the object of avoiding a due publication of the banns, the marriage is not invalidated unless the other party marries with a knowledge of the undue publication; but a publication in a false name, to the knowledge of both parties and with the intention of concealment, renders the marriage void." The latter part of that rule is applicable to the present case. Here, the wife being under age, the consent of her father to the marriage was necessary. This could only be avoided by recourse to the fraudulent trick of the wife being married in a false name. It is submitted that no due notice was given, as the notice given was given with the fraudulent intention of deceiving. In all the cases decided with regard to marriage by banns the test has been whether there has been a fraudulent intention to defeat the objects of the Marriage Acts. It is submitted that the making of a true statement is equally necessary in the case of a marriage by licence. It is admitted in the present case that the notice was given in a false name in order that the father of the wife might be kept in ignorance of the contemplated marriage.

[No reply was called for.]

LORD COZENS-HARDY M.R. This is a case of general interest and importance, but, having listened with attention to the arguments of counsel, I have no hesitation in saying that the judgment of Bargrave Deane J. cannot be supported. The case is one in which a marriage was celebrated at a registrar's office. It was a marriage by licence and not a marriage by banns. There is a distinction as regards the notice required to be given

between a marriage by licence and a marriage by banns. In the case of the latter a wilful and fraudulent misstatement in the notice to the knowledge of both parties will invalidate marriage. But in the case of a marriage by licence a licence can be obtained on payment of a certain sum of money, and after the application for it and before the marriage takes place no publicity is necessary, which seems to me to show that the principles which have been applied to marriages by banns or on notice without licence ought to have no application to a marriage by licence.

There are three authorities to which our attention has been called. The first is *Holmes* v. *Simmons* (1), which was a decision of Lord Penzance. That was a case, not of a marriage by licence, but without licence, and is therefore in a different class altogether from the present case. The only passage in the judgment in that case which I think assists the petitioner is where Lord Penzance suggests a doubt whether a notice can be considered a notice at all if it does not comply with the form and is fraudulent in intent. That is a mere dictum, but a dictum entitled, no doubt, to great weight in a case where the circumstances are similar. But here the circumstances are not similar. The second case is *Prowse* v. *Spurway* (2), a decision of Lord Hannen, which strongly supports the present appellant, and the third case is *In re Rutter* (3), a decision which, if sound, goes the whole way required in this case. Swinfen Eady J. there says: "Sect. 17 of the Marriage and Registration Act, 1856, prevents any question of residence being raised in any proceedings touching the validity of a marriage once solemnized, and, though ss. 18 and 19 impose the penalties of perjury and liability to forfeiture of property accruing by the marriage on parties wilfully giving a false notice, they do not invalidate the marriage thereby procured," for which he cites *Holmes* v. *Simmons* (1) and *Prowse* v. *Spurway* (2); and he adds: "Marriages in false names have been held valid in many cases of marriage by licence."

In my judgment we should be taking a retrograde step if we were to hold this marriage illegal, with the consequent result of bastardizing the child of the marriage. It was no doubt a slip, but it was a serious slip, that the petition did not mention the birth

(1) L. R. 1 P. & M. 523, 529. (2) 46 L. J. (P. D. & A.) 49.
(3) [1907] 2 Ch. 592, 594, 595.

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of the child. I think one of the witnesses—not a very friendly witness, I gather, to the petitioner—let fall the remark that there was a child, and that was all. That being so, the child not being a party to the suit, the Court has made an order which declares the marriage null and void and therefore bastardizes the issue. In my opinion that order cannot be supported, and the appeal must be allowed.

BANKES L.J. I agree. The matter does not appear to have been fully discussed before Bargrave Deane J., but the question that has been brought up on appeal has been fully argued, and after hearing the argument I am clearly of opinion that the judgment of Bargrave Deane J. cannot stand.

The point is quite a short one. The marriage was a marriage after notice to the registrar under s. 4 of the Marriage Act, 1836, and it is not in dispute that a false name of the lady was given to the knowledge of both the parties concerned, and was given with the intention of concealing the fact from her father that the young lady was about to go through the form of marriage. Sect. 4 provides: "In every case of marriage intended to be solemnized in England according to the rites of the Church of England (unless by licence or by special licence, or after publication of banns), and in every case of marriage intended to be solemnized in England according to the usages of the Quakers or Jews, or according to any form authorized by this Act, one of the parties shall give notice under his or her hand, ... to the superintendent registrar of the district within which the parties shall have dwelt for not less than seven days then next preceding . . . . and shall state therein the name and surname and the profession or condition of each of the parties intending marriage, the dwelling place of each of them, and the time, not being less than seven days, during which each has dwelt therein, and the church or other building in which the marriage is to be solemnized . . . ." There is no dispute here that the notice was in due form, but the particulars which were filled in were incorrect, and incorrect to the knowledge of both parties, in more than one particular. Then s. 42 provides: "If any person shall knowingly and wilfully intermarry under the provisions of this Act in any

place other than the church, chapel, registered building, or office or other place specified in the notice and certificate as aforesaid, or without due notice to the superintendent registrar, or without certificate of notice duly issued "—and so on—" the marriage of such persons, except in any case hereinafter excepted, shall be null and void."

The argument before Bargrave Deane J. and repeated here is that inasmuch as the notice was incorrect in the particulars which I have indicated it was not a " due notice," and stress was laid upon decisions, a number of which have been referred to (and there are others which might have been referred to), in which it has been held that the words " due publication of banns " include a true statement of the names of the parties who intend to go through the ceremony of marriage. Now there is no authority for the proposition that " due notice " to the registrar includes a correct statement of all the particulars which are required to be included in the notice, but the passage in the judgment of Lord Penzance in *Holmes* v. *Simmons* (1) has been relied upon as sufficient authority for the proposition which Bargrave Deane J. accepted. Lord Penzance in that case expressed himself in these terms (2): " I think, therefore, that the ' due notice ' required by the statute for the validity of a marriage such as that now in question, is notice conforming to the formalities by the statute provided, and that the words ' due notice ' will be satisfied though the contents of the notice in respect of Christian name or residence or other details are not strictly true or accurate." Therefore he covers the question of an inaccurate statement of the Christian name, and of course the same reasoning would apply to an inaccuracy in the surname. But then he goes on to say: " Whether a notice in a wholly false name (which must be done fraudulently) could be properly held a notice at all, may possibly still be a question." He merely left that point open as a matter for further consideration. But it seems to me that there is no principle upon which the distinction at which the learned judge hinted at can be drawn. If a deliberate misstatement according to the learned judge's view is not sufficient to constitute a notice not a " due notice," it seems to me impossible to draw a logical distinction between that case

(1) L. R. 1 P. & M. 523. (2) Ibid. 528, 529.

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and a case which somebody might designate as a case of fraud where a person deliberately and with set purpose gives a false name. It seems to me impossible to draw a distinction between a case where it is done fraudulently and a case where it may be said not to be done fraudulently. But Swinfen Eady J. in *In re Rutter* (1) treats the matter as beyond all question. He says—and I think he is right in saying—that "marriages in false names have been held valid in many cases of marriage by licence," and then he cites authority in support of that view, and as far as I have been able to look into them in the short time at my disposal they seem to me entirely to support the learned judge's view. The conclusion I have come to is that there is no authority for saying that the giving of due notice requires anything more than the giving of notice in due form of law, that is to say, in the form required by the statute, and that the reasoning applicable to the due publication of banns does not apply to the case of a notice for a marriage given under s. 4 of the Marriage Act, 1836.

On these grounds I think the appeal succeeds.

WARRINGTON L.J. I am of the same opinion. The marriage in this case was solemnized before the registrar by licence of the superintendent registrar. In that case the provisions of the Marriage Act, 1836, and the Marriage and Registration Act, 1856, applicable are to this effect—first, notice of the intended marriage must be given, and that notice must state, amongst other things, the name and surname of each of the parties intending marriage; it must be accompanied by a declaration confirming the correctness of the statements contained in the notice, and a person making a false declaration is rendered liable to the penalties of perjury. The notice in the case of a marriage by licence is, like other notices, filed by the superintendent registrar and a copy thereof entered in a book which is open to inspection without payment of any fee, but it is not otherwise published, as is the case of a notice of a marriage intended to be solemnized not by licence. Not only is the notice not otherwise published than by being entered in the registrar's book, but the only interval necessary between the giving of the notice and the issuing of the

(1) [1907] 2 Ch. 592, 595.

certificate of due notice and the issue of the licence itself is one day. It is obvious, therefore, from those provisions that the Legislature did not intend in the case of a marriage by licence before the registrar that there should be any more publication of the fact of the intended marriage than in the case of a marriage by licence in church under the old ecclesiastical rules. The matter does not rest there. Provisions were made both in the Marriage Act, 1836, and the Marriage and Registration Act, 1856, for validating the marriage notwithstanding that certain conditions had not been complied with. Sect. 43 of the Act of 1836 (now repealed) recognized that a marriage might be valid although it was had by means of "any wilfully false notice, certificate or declaration," and s. 19 of the Act of 1856, which replaces that section, contains a similar provision where the marriage is had by means of "any wilfully false declaration, notice, or certificate." It seems to me, therefore, that in a case of marriage by licence under the express terms of the statute, although the notice or declaration may be wilfully false, yet the marriage itself will be valid, the means resorted to by the Legislature for protecting the public and the parties concerned against such false notice being the imposition of extremely severe penalties upon those who sign a false notice or make a false declaration.

But the matter does not stop merely on the interpretation of the statute as it seems to me it ought to be interpreted, because I think the case is covered by authority; and in particular I refer to the statement of the law by Lord Penzance in *Holmes* v. *Simmons* (1), not in giving judgment, but in the course of the argument. (2) I think what he says there covers the case of a marriage by licence, although the case before him was not one of a marriage by licence, but of a marriage after publication in the registrar's office of the notice, and that the passage in his judgment as to notice in a wholly false name (3) must be read in reference to the facts of the case before him.

Secondly, I think the case is covered a fortiori by the decision in *In re Rutter* (4), which was also a case of a marriage after publication by notice, and was not a case of marriage by licence.

(1) L. R. 1 P. & M. 523.
(2) L. R. 1 P. & M. 525.
(3) L. R. 1 P. & M. 529.
(4) [1907] 2 Ch. 592.

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In my opinion, therefore, it comes to this: that in the case of a marriage by licence, which is the only case with which we here have to deal, although both parties may make a false statement as to the names for the purpose of the notice and declaration, yet the marriage will be valid, the consequence of giving the false notice being not to invalidate the marriage, but to expose the parties to penalties of perjury.

LORD COZENS-HARDY M.R. The appeal will be allowed, the decree nisi rescinded, and the petition dismissed.

Solicitors: *The Official Solicitor; The King's Proctor; Sterns.*

W. I. C.

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July 2.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(IN PRIZE.)

IN THE MATTER OF THE GERMAN CRUISER KÖNIGSBERG.

Prize Court—Prize Bounty—Destruction of Enemy Warship—Aeroplane Assistance—R.N.A.S. Pilots and Observers—Naval Prize Act, 1864 (27 & 28 *Vict. c.* 25), *s.* 42—*Order in Council of March* 2, 1915.

An enemy warship was destroyed by two of His Majesty's monitors with the assistance of two aeroplanes, the pilots and observers of which were specially attached to the monitors for the purpose of the attack and were borne on the ships' books:—

Held, that the pilots and observers formed part of the crews of the monitors within the meaning of s. 42 of the Naval Prize Act, 1864, and therefore were entitled to share in the prize bounty distributable in accordance with the provisions of that section.

MOTION FOR PRIZE BOUNTY.

The applicants, the officers and crews of His Majesty's monitors *Severn* and *Mersey* (including the pilots and observers of two aeroplanes), claimed a declaration that they were entitled to have distributed among them, in accordance with s. 42 of the Naval Prize Act, 1864, the sum of 1920*l.* as prize bounty for the destruction of the German armed cruiser *Königsberg*.

On July 6, 1915, the *Königsberg* was engaged in the Rufiji river, German East Africa, by the *Severn* and the *Mersey*, with the

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assistance of two aeroplanes, which dropped bombs on the *Königsberg* and also "spotted" for the monitors. The *Königsberg* was out of sight of the monitors, and the observers in the aeroplanes had great difficulty in marking the fall of the shots, which fell among the trees. On July 11 the attack was resumed on the same lines, and the observers, by accurate "spotting," soon got the guns of the monitors on the target and hit after hit was signalled, with the result that the *Königsberg* was set on fire and destroyed. The aeroplane pilots and observers belonged to the Royal Naval Air Service; their aerodrome was on Mafia Island, thirty miles away, but they were lent to the *Severn* and the *Mersey* for these operations and were borne on the books of these two vessels.

The normal complement of the *Königsberg* was 384 persons, and it was ascertained from prisoners that while in the Rufiji River she was kept constantly ready and prepared for putting to sea.

Commander Maxwell Anderson, R.N., for the applicants. The only novel feature in the case is the question of the aeroplanes. The two officers and the observers of these machines being borne on the books of the two monitors for the special purpose of these operations, formed part of the ships' companies. Their position is analogous to that of a man-of-war boat's crew, who might be engaged on boat work some distance away and yet would be part of the ship's company.

Harold Hardy (*T. Mordaunt Snagge* with him), for the Procurator-General. It is admitted that the aeroplane pilots and observers were attached to the monitors for the purpose of the operations.

THE PRESIDENT (SIR SAMUEL EVANS). This application is made on behalf of the officers and crews of His Majesty's monitors *Severn* and *Mersey*, in respect of the destruction of the German armed cruiser *Königsberg* in the Rufiji River, in the circumstances described. The only new feature in this case—and it is a new feature, for it occurs for the first time—is that the application is made also on behalf of the pilots and observers who were serving in the aeroplanes that they may be included among the persons who are entitled to have prize bounty granted and distributed. The pilots and observers of the aeroplanes belong to the Royal

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Naval Air Service, and it is admitted that they were attached to the *Severn* and the *Mersey* for the purpose of this operation. It is clear also from the official report that the services rendered by them were of a very valuable kind in bringing about the destruction of the German cruiser.

Sect. 42 of the Naval Prize Act, 1864, is as follows: "If in relation to any war, Her Majesty is pleased to declare, by Proclamation or Order in Council, her intention to grant prize bounty to the officers and crews of her ships of war, then such of the officers and crew of any of Her Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of Her Majesty's enemies shall be entitled to have distributed among them as prize bounty a sum calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement." By an Order in Council of March 2, 1915, the King declared his intention to grant prize bounty in accordance with that section. In my opinion those serving in the aeroplanes should, for the purposes of this section, be treated as part of the crews of the *Severn* and *Mersey*, to which vessels they were attached.

I pronounce and declare, therefore, that the officers and men on the *Severn* and *Mersey* and the officers and men of the two aeroplanes were present at and assisted in the destruction of the armed ship *Königsberg*, belonging at the time to enemies of His Majesty, and I find, also, that at the time of the engagement there were on board the *Königsberg* 384 persons. The amount of the prize bounty to be distributed is therefore 1920*l.*

Solicitors for the applicants: *Botterell & Roche.*

Solicitor for the Procurator-General: *The Treasury Solicitor.*

E. C. T.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION. 1917
ADMIRALTY. *April* 26, 27; *May* 17, 23.

THE STRANTON.

[1915, fol. 93.]

Admiralty—Collision—Compulsory Pilotage—Vessel passing through Pilotage District—Pilotage Act, 1913 (2 & 3 *Geo.* 5, *c.* 31), *ss.* 10, 11, 59, *and* 60—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 605 *and* 633.

A British vessel, bound from Sharpness to Middlesbrough in ballast, was held partly to blame for a collision in the Downs off Deal, a compulsory pilotage district. The fault was solely that of the duly licensed pilot in charge of her. Her owners pleaded that pilotage was compulsory, and that they were entitled to avail themselves of the defence afforded by s. 633 of the Merchant Shipping Act, 1894.

Under s. 605 of the Merchant Shipping Act, 1894, the vessel would have been exempt from the obligation to take a pilot, but this section was repealed by s. 60 and Sched. II. of the Pilotage Act, 1913. By s. 10 of the latter Act, subject to the provisions of the Act all exemptions from compulsory pilotage cease to have effect. By s. 11, sub-s. 1, pilotage is obligatory on every vessel (other than certain ships exempted by s. 11, sub-s. 3) "while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district":—

Held, that s. 11, sub-s. 1, excluded vessels merely passing through a compulsory pilotage district, that the vessel was exempt, and that her owners therefore were responsible for the pilot's negligence.

Action of Damage by Collision.

Issue as to compulsory pilotage.

The plaintiffs were the owners of the steamship *Benvorlich*; the defendants were the Angus Shipping Company, Limited, the owners of the steamship *Stranton*.

The collision took place on the evening of December 30, 1914, in the Downs off Deal. The *Benvorlich*, a screw steamship of 3380 tons gross; of the port of Leith, was bound from Sharpness to Middlesbrough in ballast. She was in charge of a duly licensed Trinity House pilot. The *Stranton*, a screw steamship of 1678 tons

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gross, of the port of Dundee, was bound from Jarrow to Rouen with a cargo of coal.

On April 27, 1917, the learned President, who was assisted by two of the Elder Brethren of the Trinity House, found both vessels to blame. He apportioned the blame in the proportions of three quarters to the *Stranton* and one quarter to the *Benvorlich*, and held that the negligence attributable to the *Benvorlich* was solely that of her pilot. The owners of the *Benvorlich* alleged that the pilot was compulsorily in charge. This issue stood over for further consideration.

May 17. *Dawson Miller*, *K.C.*, and *D. Stephens*, for the plaintiffs. The question is whether a vessel passing through a compulsory pilotage district, while on a voyage between two places situate outside the district, is exempt from the obligation to take a pilot under the Pilotage Act, 1913. Before that Act the *Benvorlich* was undoubtedly exempt under s. 605 of the Merchant Shipping Act, 1894, but that section was repealed by s. 60 of the Act of 1913. Sect. 10 of the latter Act provides that pilotage shall continue to be compulsory in every pilotage district in which it was previously compulsory, and that subject to the provisions of the Act all exemptions from compulsory pilotage shall cease to have effect. There is no express provision exempting vessels passing through a compulsory pilotage district, and the only possible section which it can be suggested impliedly exempts the *Benvorlich* is s. 11, sub-s. 1, which imposes the obligation to take a pilot on vessels "entering, leaving, or making use of any port in the district." That sub-section does not necessarily exclude a vessel passing through a district in which pilotage is compulsory, and having regard to the express provision in s. 10 abolishing exemptions except where the Act otherwise provides, and to the fact that the *Benvorlich* was not an "exempted" ship under the Act (see s. 11, sub-s. 3), it is submitted that while navigating in the London Trinity House district she was obliged to take a pilot and her owners can avail themselves of the defence of compulsory pilotage given by s. 633 of the Merchant Shipping Act, 1894. [*The Earl of Auckland* (1) was referred to.]

Laing, *K.C.*, and *Raeburn*, for the defendants. Pilotage was not

(1) (1861) Lush. 164.

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compulsory. Although s. 10 of the Pilotage Act, 1913, purports to abolish all existing exemptions, such abolition is "subject to the provisions of this Act." By s. 59 of the Act all exemptions from compulsory pilotage remain in force until provision is made by Pilotage Order to the contrary, and no Pilotage Order has been made affecting vessels in the position of the *Benvorlich*, or indeed could be made, having regard to s. 14, which expressly provides against the defence of compulsory pilotage being extended to an area in which pilotage was not compulsory previously. Further, the *Benvorlich* was only passing through the London Trinity House district; she was not navigating in the district for the "purpose of entering, leaving, or making use of any port in the district," and therefore under s. 11 was exempt from the obligation of taking a pilot: see *Cannell* v. *Lawther, Latta & Co.* (1)

Dawson Miller, K.C., in reply. Sect. 14 of the Pilotage Act, 1913, deals with the area itself and not with the class of ship. This case depends solely on the construction of ss. 10 and 11.

Cur. adv. vult.

May 23. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—The *Benvorlich* was held partly to blame for the collision in this case. Her owners pleaded that the vessel was in charge of a duly licensed pilot within a compulsory pilotage district, who was solely to blame, and relied upon this as a defence to the counter-claim for damages. The question is whether this defence avails them.

The collision took place in the Downs, off Deal, within the London Trinity House district. The vessel, however, was only passing through that district on a voyage between Sharpness and Middlesbrough, both of which places were outside the district. Under s. 605 of the Merchant Shipping Act, 1894, the vessel would be exempt from any obligation to take a pilot. That section was repealed by the Pilotage Act, 1913 (s. 60 and Sched. II.). But for the decision of the question which arises, various provisions of the latter Act must be considered.

It was part of the scheme of the Act to supersede s. 633 of the

(1) [1914] 3 K. B. 1135.

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Merchant Shipping Act, 1894, and to put an end, after a suspensory period, to the defence of compulsory pilotage in collision cases; and in the meantime to prevent the application of such a defence in any newly-created pilotage area (vide ss. 14 and 15). Counsel for the owners of the *Benvorlich* relied upon the last sentence of s. 10, sub-s. 1: "Subject to the provisions of this Act all exemptions from compulsory pilotage in force at the date of the passing of this Act shall cease to have effect." He candidly avowed his view that it was not the intention of the Act to abolish the exemption with which the present case is concerned, or to allow the defence of compulsory pilotage where it did not exist before. But he contended that a strict reading of the Act had that effect. It may also be stated in passing that the pilotage authority have never considered that pilotage was compulsory for a vessel passing through like the *Benvorlich*, either before or since the 1913 Act, and have accordingly never made arrangements for such pilotage. But the question, of course, remains, what has the Legislature enacted? It has been observed that the abolition of exemptions in s. 10 was made "subject to the provisions of this Act." The provisions relating to compulsory pilotage are contained in s. 11; and the only sanction which the Act contains are the penalties imposed by sub-s. 2 of that section. The *Benvorlich* was not a ship to which those provisions and sanction apply. The words "while navigating in a pilotage district in which pilotage is compulsory *for the purpose of entering, leaving or making use of any port in the district*" exclude vessels merely passing through.

Moreover, s. 59 expressly provides that any exemptions such as those contained in the Merchant Shipping Act, 1894, shall remain in force, notwithstanding anything in the Act or any repeal effected by it, until provision is made by Pilotage Order or by-law made under the statute superseding them. No provision superseding the exemption now under discussion has been made by the London Pilotage Order and Bye-laws, 1913. And indeed, having regard to s. 14 of the Act, no such provision could be made which would have the effect of allowing the defence of compulsory pilotage to an action for negligent navigation where it did not exist at the date of the passing of the Act.

Upon these grounds I decide that the owners of the *Benvorlich*,

the defendants to the counter-claim, must bear the damages for which my judgment upon the facts rendered them responsible. 1917 THE STRANTON.

Solicitors for plaintiffs: *Holman Fenwick & Willan.*

Solicitors for defendants: *Thomas Cooper & Co.*

E. C. T.

[IN THE COURT CONSTITUTED UNDER THE BENEFICES ACT, 1898.] 1917 *June* 5, 6, 7, 8.

RICE *v.* THE BISHOP OF OXFORD.

Ecclesiastical Law—Appeal from Inhibition of Incumbent and Appointment of Curate by Bishop of Diocese—Inadequate Performance of Ecclesiastical Duties of Benefice—Commission under Pluralities Acts and Benefices Act, 1898—*Duty of Judge of Court constituted under Benefices Act*, 1898, *as to Findings of Law and Fact—Discretion of Archbishop as to Orders to be made after Findings of Judge—Benefices Act*, 1898 (61 & 62 *Vict. c.* 48), *s.* 9, *sub-ss.* 1, 6; *s.* 13, *sub-ss.* 1, 3—*Practice—Right to begin—Disregard of formal Objections—Benefice Rules*, 1899, *rr.* 21, 43—*Costs.*

In an appeal under the Benefices Act, 1898, against the inhibition by the bishop of the diocese of an incumbent of a parish in the diocese as to whom the majority of a Commission under the Pluralities Acts and the Benefices Act, 1898, has reported that the ecclesiastical duties of the benefice had been inadequately performed owing to the negligence of the incumbent and against the appointment by the bishop of a curate to perform the duties of the benefice, the appellant begins.

The incumbent of a parish church was inhibited by the bishop of the diocese in which the parish church was situate from performing until further notice any of the ecclesiastical duties of the benefice after the majority of the Commissioners appointed on a Commission issued under the Pluralities Acts and the Benefices Act, 1898, had reported that the ecclesiastical duties of the benefice had been inadequately performed, and that that was due to the negligence of the incumbent. The bishop further appointed a curate to perform the duties of the benefice. Against the inhibition and against the order of the bishop so appointing a curate the appellant appealed to this Court. The appeal was heard before the Archbishop of Canterbury, within whose province was the diocese of the bishop by whom the inhibition had been issued, and Lord Coleridge J., the judge appointed to be judge of the Court

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constituted under the Benefices Act, 1898; and after witnesses had been examined orally on behalf of the appellant and of the respondent, the bishop of the diocese, the judge, after observing that he was the sole judge of law and fact, and in discharging the function laid upon him had to find whether and in what respect the appellant had been negligent by causing the ecclesiastical duties of the benefice to be inadequately performed whilst the Archbishop had to determine whether or not, having regard to the findings of the judge, the appellant should be inhibited, and whether a curate should or should not have been appointed, decided that the appellant had been negligent in the performance of the ecclesiastical duties of the benefice, comprising in those words the observance of the promises as to conduct which the appellant had solemnly made at his ordination in the following matters—i.e., that he had grossly abused the legitimate use of the pulpit by in his sermons denouncing persons by name and holding them up to the ridicule, contempt, and opprobrium of the congregation; had habitually used foul language in the parish; had been proved in several instances to have so conducted himself with intemperate language and violent and threatening gestures as calculated to undermine the whole influence which any person in holy orders should wield; and had been convicted of an assault. Thereupon the Archbishop in his discretion pronounced that the appointment of the curate had been rightly made and that the appellant should be inhibited from the performance until further notice of all the ecclesiastical duties of the benefice.

It is not necessary to render a report of the majority of the Commissioners on a Commission under the Pluralities Acts and the Benefices Act, 1898, valid that the draft report should have been submitted to those Commissioners in the minority who dissent from the conclusion come to by the majority of the Commissioners. Any objection founded on the draft report not having been sent to all the Commissioners is a formal objection within r. 43 of the Benefice Rules, 1898, and is therefore bad.

Observations as to the proper course to be taken where a minority of the Commissioners on a Commission under the Pluralities Act, 1838, dissents from the majority of the Commissioners.

THIS was an appeal brought under sub-s. 6 of s. 9 of the Benefices Act, 1898 (1), on behalf of the Rev. William Rice, rector of the rectory and parish church of Sympson in the county of Buckingham, diocese of Oxford and Province of Canterbury, against the inhibition of the Bishop of Oxford under sub-s. 1 of s. 9 of the Benefices Act, 1898, dated March 7 last, and inhibiting the appellant from until further notice performing any of the ecclesiastical duties of the

(1) See note (1), p. 193, post.

benefice of Sympson, and from the appointment by the same Bishop on the same date of the Rev. Hugh Legge as curate to perform the ecclesiastical duties of that benefice in the place of the appellant.

The above-mentioned inhibition was issued and served on the appellant and the above mentioned appointment of the Rev. Hugh Legge made (1) after a Commission under s. 77 of the Pluralities Act, 1838 (2), s. 3 of the Pluralities Acts Amendment Act, 1885 (3), and s. 8 of the Benefices Act, 1898, had been appointed by the Bishop of Oxford on September 23 last and a majority of the Commissioners had reported that the ecclesiastical duties of the benefice of Sympson had been inadequately performed and that the inadequate performance of such duties was due to the negligence and wilful default of the appellant. (4)

The grounds of appeal brought into the registry on behalf of the appellant with the notice of appeal stated in substance as follows :—

The Commissioners never considered, adjudicated upon, determined, or reported on the matters referred to them ; or, alternatively, that the report of the Commissioners—

(i.) Did not justify the making of the appointment and inhibition ;

(ii.) Was wrong in law and contrary to natural justice in that the appellant's request for information as to the specific charges against him was refused, and the Commissioners went into evidence covering a period of twenty-one years without notice to the appellant of any specific charge against him ;

(iii.) Was largely based on hearsay evidence and matters which were never proved, the Commissioners, notwithstanding objection taken, receiving evidence of convictions referred to in the report while refusing to inquire into the truth of the charges to which the convictions referred ;

(iv.) Did not state in what respect the appellant had been negligent, and there was no evidence on which the Commissioners could come to their conclusions of fact ;

(1) Notice of the inhibition and the appointment of a curate was directed to be affixed by the churchwardens on the outer door of the parish church.

(2) 1 & 2 Vict. c. 106.

(3) 48 & 49 Vict. c. 54.

(4) See note (2), p. 195, post, where the substance of the report of the majority of the Commissioners is set out.

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(v.) Was not in accordance with the facts in finding—

(*a*) That the church in Sympson had lost the hold which it formerly had over the people, and that the appellant had lost his influence and had been in default in visitation of the whole and of the sick;

(*b*) That the appellant had subordinated his duties as priest to his interest as a landowner, and his preoccupation with secular affairs had led to his performing the ministrations of the Church in a perfunctory manner;

(*c*) That the appellant gabbled through the prayers indistinctly and preached sermons which were incoherent and had no connection with the text or Church doctrine;

(*d*) That the appellant was continually in dispute with his neighbours and had been five times brought before the magistrates and fined on minor charges, and had attacked persons from the pulpit in intemperate language;

(*e*) That the conduct of the appellant had been in contravention of his promises at ordination, and that the ecclesiastical duties of the benefice had been inadequately performed owing to the negligence or wilful default of the appellant.

Notice that notice of appeal had been lodged in the registry was duly given to the respondent, the Bishop of Oxford.

The appeal came on to be heard on June 5 last before the Archbishop of Canterbury and Lord Coleridge J., the judge of the Court constituted under the Benefices Act, 1898, and the hearing was continued on June 6, 7, and 8 last.

Clavell Salter, K.C., and *Hayden* appeared for the appellant.

Talbot, K.C., and *E. W. Hansell* appeared for the respondent.

On the case being called on a discussion arose as to the right to begin, and the counsel for the appellant submitted that the appellant being charged in the report with negligence and wilful default, and the proceedings being in the nature of a rehearing, the onus of making out the charge was on the respondent, who ought therefore to begin: otherwise it would be calling on the appellant to prove a negative.

The counsel for the respondent submitted that the appellant ought to begin. The object of the Benefices Act, 1898, was to

secure that the ecclesiastical duties of the parish were adequately performed, and the Commissioners having reported adversely to the appellant the onus of showing that they were wrong was upon him. From the language of r. 21 of the Benefices Rules, 1899 (1), "the appellant and the bishop," the inference was that the appellant was to begin.

LORD COLERIDGE J. ruled that the appellant must begin.

The case then proceeded.

Witnesses on behalf of the appellant and the respondent were examined orally in Court. The result of their evidence appears from the judgments.

Clavell Salter, K.C., and *Hayden*, for the appellant, relied on the grounds of appeal set forth on behalf of the appellant, and contended that nothing in the conduct of the appellant justified the granting of the inhibition or the appointment of a curate to officiate in his place.

Talbot, K.C., and *E. W. Hansell*, for the respondent. The action of the respondent in granting the inhibition and the appointment of a curate was for the benefit of the parish, and the appellant has clearly been guilty of negligence in the performance of the ecclesiastical duties of the benefice so as to justify the measures taken by the respondent. [They referred to sub-s. 3 of s. 13 of the Benefices Act, 1898, as to the extended meaning of the words "ecclesiastical duties" and to the Ordination Service for Priests in the Book of Common Prayer with respect to the promises then made by the appellant.]

The following judgments were delivered:—

LORD COLERIDGE J. This is an appeal under sub-s. 6 of s. 9 of the Benefices Act, 1898, against the inhibition of the appellant by the Bishop of Oxford based upon the report of a Commission appointed under s. 77 of the Pluralities Act, 1838, as amended by the Pluralities Act Amendment Act, 1885, and the Benefices Act, 1898, finding that the ecclesiastical duties of the benefice of Sympson

(1) These rules are set out Statutory Rules and Orders, 1899, Part I., pp. 7–18.

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are inadequately performed owing to the negligence and wilful default of the appellant. The appeal is also against the appointment of a curate by the Bishop of Oxford to perform the ecclesiastical duties of the benefice. The expression "ecclesiastical duties of the benefice" has the meaning given to it as is provided by sub-s. 3 of s. 13 of the Benefices Act, 1898. [His Lordship read the subsection in question and proceeded :] As this is the first sitting of this appeal Court it perhaps will be well for future guidance that I should make some general observations before dealing with the particular case. The functions of the Archbishop of Canterbury and of myself are distinct. I am sole judge of law and fact. I have to find whether and in what respect the appellant has been negligent. If I find he has not been negligent, the inhibition is gone. If I find he has, I have discharged the function imposed upon me, and the Archbishop has a discretion which is final as to whether to pronounce that the appellant should be inhibited from performing all or any of the ecclesiastical duties attaching to the benefice.

The appeal is not from the report of the Commission, but against the inhibition. Neither party (neither the appellant nor the respondent, the Bishop of Oxford) is precluded from bringing fresh evidence, calling fresh witnesses and raising fresh points (see the Benefices Rules, 1899, r. 21), and no proceeding is to be defeated by any formal objection (see the Benefices Rules, 1899, r. 43). This disposes of one objection raised against the report. There were seven Commissioners. After hearing the evidence, at a meeting at which six of the Commissioners were present, all but one agreed that the duties of the benefice had been inadequately performed. A full draft report was drawn up and submitted to and approved of by all but the one dissentient Commissioner. The report was not sent to him because he dissented from the conclusion come to by the other Commissioners. If the report had been sent to him he would have formally dissented, but that would not have invalidated the report, which is a good report if the major part of the Commissioners report as they have reported here (see the Pluralities Act, 1838, s. 77). Any objection founded on the draft report not being sent to him, apart from any other argument, is a formal objection under the 43rd rule of the Benefices Rules, 1899, and therefore bad. The report therefore is a good report in law and a

document on which the Bishop could act. But it would be more satisfactory, and I should strongly advise that in the future the draft report should be submitted to all the Commissioners for affirmation, alteration, or rejection.

Lord Coleridge J.

I have the duty cast upon me of deciding on the evidence whether the appellant has been negligent in the performance of his ecclesiastical duties, and ecclesiastical duties comprise the observance of all the promises as to conduct which every clergyman of the Church of England solemnly makes at the time of his ordination. Moreover, no limitation of time is set to the bringing of charges, and it is obviously intended that the evidence of acts, to constitute negligence, should not be limited in point of time or number, but that due weight should be given to the accumulative effect of acts done or omitted over a long period. I think, therefore, that, having regard to the severity of the decision to inhibit, I am invited by the law to look to systematic acts of negligence if acts taken separately would not justly incur such consequences.

The argument for negligence in diminished congregations has been pressed. I do not think that a small congregation has been satisfactorily proved to be solely due to the way in which the appellant conducts the services. The parish is an awkward one. The majority of the parishioners are on the border of Fenny Stratford parish and are naturally diverted by the churches there. At the most, before the war, less than two hundred persons were rural parishioners. Moreover, the church was restored at a cost of thirteen hundred pounds, the belfry rebuilt, and a bell added, partly, if not entirely, through the energy of the appellant, not unassisted from his own pocket.

The congregation is small no doubt, but I do not think it clearly proved that it was much smaller than in the time of the appellant's predecessor. It is alleged that the services are too infrequent. There are two services, morning and evening, every Sunday, Communion once a month on Sunday, and additional services on certain Holy Days and Festivals. For two years, at the request of one or two of the parishioners, an early Communion was instituted. It was given up, not, I think, for the reason given, but because, it may be, of sparse attendance; it may be of disinclination. This is perhaps an old-fashioned number of services; but the parish is

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a rural parish sparsely populated. There is no doubt a modern tendency to much greater frequency. There are two opinions about this. While bearing testimony to the energy and devotion of the clergy, it is open to the objection that it may take the time from visiting the sick, from necessary and healthy relaxation, and, not least important, it may curtail the time for reading and reflection which the preparation of sermons ought to necessitate. It is not, therefore, in my opinion, negligence to fall short of what is done in this regard in parishes where there is greater clerical power and more is exacted from the clergy. Sunday school classes seem not to have been inefficiently conducted; nor is the statement in the report correct that in many years no candidate has been presented for Confirmation. It may be said that more candidates might have been presented for Confirmation, but the absence of such does not amount to negligence.

Similarly, in my opinion, the case against the appellant of non-visitation of the sick has been overstated in the report. It is admitted that there is no case of a refusal to visit when sent for, and we have had several instances of unsolicited visitation.

It has been alleged against the appellant that he subordinated his duties as a clergyman to matters agricultural. The appellant owns a glebe farm which is the main element in his stipend. In the absence of a tenant, who he alleges was practically unprocurable on profitable terms owing to the character and position of the land, he farmed the glebe himself. There is nothing essentially negligent in doing so if it does not seriously interfere with his parochial duties. He is said to have walked with or driven his sheep to the station on Sundays to be in time for the Monday morning market in London. I do not find it proved that he did so. We had evidence that on one or two occasions he was a few minutes late for service. The evidence that he came into church filthy and dirty was unsatisfactory, and I do not find this accusation proved. His recitation of the service is alleged to have been gabbling, rapid, indistinct, and incoherent; but the evidence of this was conflicting. The appellant is a Welshman, of rapid utterance, but the evidence falls short of such deliberate "gabbling," as it is called, as to convince me that he was negligent in this respect. It would be well if all clergymen were

distinct at all times ; but we must not, with the experience we have, judge the appellant by too high a standard.

As to the appellant's sermons there is more to say. This is a difficult subject to deal with. Some persons whose faith is unclouded with doubt relish and appreciate constant dealing with matters purely doctrinal ; others are more interested when the discourse, avoiding these, deals with matters concerning practical life and conduct. It may be reasonable, indeed desirable, if not necessary in the interest and morals and conduct of the parish, to allude to local matters. But such allusions should be governed by infinite tact, which is not the possession of all. To denounce individuals by name from a position where argument and contradiction is impossible, not for the genuine purpose of invoking a higher standard of conduct and life, but to gratify personal spleen and to hold such persons up to the ridicule, contempt, or opprobrium of the congregation, is to debase the high calling of a clergyman.

It is said that the congregation was often induced to laugh : a charitable humour is not necessarily to be banished from the pulpit ; some of the greatest preachers have employed it. But unseemly gibes, and the introduction of unseemly subjects merely to create a laugh, detract from the essential solemnity that should underlie all preaching.

It is said that the appellant has introduced politics into his sermons. Here again I should not lay down any hard and fast rule. It would be a sad day for this country when all politics were divorced from religion. As a rule the introduction of politics, far too often indulged in, offends many of the hearers. I can conceive, however, a case where some high ideal is involved in some political contest, such as peace and war or temperance, where a clergyman may honestly and reasonably think it his duty not to avoid such subjects. But the introduction in vulgar abuse of the names of politicians defeats the whole object to be attained and arouses antagonism and heat, far removed from the legitimate use of the pulpit, and defies the vows taken at ordination.

I find as a fact, without going into details, that the appellant has grossly abused in all these respects the legitimate use of the pulpit ; that he has thereby given great and natural offence and has been proved to be guilty of negligence in the performance of his ecclesiastical duties.

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In regard to the appellant's language used in the parish, the evidence shows that he has an ungoverned temper. Here again we must not be too critical. Some men are slow to wrath; some have irascible tempers. Because a man is a clergyman we must not expect that he must therefore of necessity change his disposition. An occasional expletive hastily uttered and at once repented of may be excused by human infirmity, but an habitual use of such language unfits a man to be a clergyman. It produces the worst impression, saps his influence, and encourages others, to whom he ought by his calling to show an example, to be foul-mouthed and unrestrained in their utterances.

I find as a fact that the appellant is in the habit of using foul language, and in doing so not as an unfortunate exception, but as a habit, he has been guilty of negligence.

A quarrelsome disposition with his neighbours, if indulged in, and especially if accompanied by intemperate language and violent and threatening gestures, is calculated to undermine the whole influence a clergyman should wield.

I find that in several instances this has been proved by the evidence, and that in this matter the appellant has been guilty of negligence.

Finally, a clergyman should at all times be a man of peace. A priest at his ordination vows to maintain and set forward quietness, peace, and love among all Christian people, and especially among them that are committed to his charge. If he is to do this he must first set an example of that quietness, peace, and love which he is to persuade others to follow. If he himself is guilty of assault it is impossible for him to do so.

Without going in detail into the other occasions alluded to, on April 22, 1915, the appellant was found guilty of assault by the magistrates and fined two pounds. I do not say that this tribunal is bound by this finding: it can be reopened. But the conviction stands, and no appeal has been, or now can be, lodged against it. Nothing in the evidence brought forward has proved, to my mind, that the conviction was wrong.

I find, therefore, that in this case also the appellant has been guilty of negligence in the performance of his ecclesiastical duties; and here my function ends.

THE ARCHBISHOP OF CANTERBURY. Attention has already been directed both from the Bar and from the Bench to the importance of this case as the first instance in which the Court constituted under the Benefices Act of 1898 for the hearing of an appeal has been called upon to exercise its functions.

The law relieves me of the responsibility of adjudicating as to the truth or falsehood of the charges which were made against the incumbent and of deciding generally (I quote the words of the Act) "whether the incumbent has been negligent as aforesaid." The duty of so adjudicating has been discharged by the learned judge who sits beside me. He has decided on the strength of the evidence given that there is adequate and abundant proof of the repeated abuse of the pulpit by unseemly preaching, of the habitual use of bad language, of frequent exhibition of a quarrelsome disposition towards his neighbours, and even of physical assaults upon his neighbours.

The delinquencies are, as the learned judge has decided, to be taken together and as evidence of a general course of behaviour. These things have been legally decided. My duty comes next. I have, in accordance with the provisions of the law, to determine whether, by reason of the negligence which is now finally proved, "the appointment of a curate" should have been made, and also whether "the incumbent should be inhibited from performing any and what ecclesiastical duties of his benefice."

In considering that question I have given careful attention to the distinctive provisions of the actual law which we are now administering. In addition to what was prescribed in the previously existing law, which still of course holds good, it was enacted in 1898 that "the expression 'ecclesiastical duties' shall in all respects include . . . . the observance of all the promises as to conduct which every clergyman of the Church of England solemnly makes at the time of his ordination; and the expression 'negligence' in the performance of ecclesiastical duties shall include wilful default in the performance of such duties."

It devolved upon the learned judge to interpret these words fairly, so as to avoid on the one hand the laying down of a criterion so high that no ordinary man will be found to reach it, and on the other hand such emasculating of the meaning of the words as would reduce them to an empty formula.

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The judge has decided that the incumbent did preach the outrageous sermons which have been quoted, that he did habitually or frequently use the sort of language attributed to him, that he did habitually comport himself in a fashion utterly unbecoming to his sacred calling, and in flat contravention of the "promises as to conduct" solemnly made at the time of his ordination.

In deciding as Archbishop what action, if any, of a prohibitory kind ought to be taken for the protection of parishioners from such a course of behaviour and conduct on the part of their parish priest, I feel bound to note that the law requires that the Archbishop as well as the judge should hear the evidence given. Why is he to hear it? Certainly not for deciding as to its truth or falsehood, or as to the legal nature of the offences, if any—that belongs to the judge—but in order that when determining what steps must follow upon the proved offence or negligence he may have its whole character clearly before him. He will have seen on what grounds the judge has decided whether the "negligence" is habitual or isolated and exceptional. He will consider in particular what is its bearing upon the incumbent's pastoral usefulness and upon his general relation to and influence among the parishioners, to whom he has promised to make himself "a wholesome example and pattern," and among whom he is to "maintain and set forward quietness, peace, and love." The promises thus made do not stand in our Ordination Service isolated or unexplained. Before putting the questions to, and inviting the promises from, those whom he is about to ordain the bishop elucidates and enforces their meaning: "Forasmuch as your Office is both of so great excellency, and of so great difficulty, ye see with how great care and study ye ought to apply yourselves, as well that ye may show yourselves dutiful and thankful unto that Lord who hath placed you in so high a dignity; as also to beware that neither you yourselves offend, nor occasion that others offend. . . . . We have good hope that you have well weighed and pondered these things with yourselves long before this time; and that you have clearly determined, by God's grace, to give yourselves wholly to this Office, whereunto it hath pleased God to call you; so that, as much as lieth in you, you will apply yourselves wholly to this one thing, and draw all your cares and studies this way; . . . . and that ye may so endeavour yourselves, from time

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to time, to sanctify the lives of you and yours, and to fashion them after the Rule and Doctrine of Christ, that ye may be wholesome and godly examples and patterns for the people to follow."

Then come the questions and promises, and amongst them are these:—*Q.* "Will you be diligent to frame and fashion your own selves, and your families, according to the Doctrine of Christ; and to make both yourselves and them, as much as in you lieth, wholesome examples and patterns to the flock of Christ?" *A.* "I will apply myself thereto, the Lord being my helper." *Q.* "Will you maintain and set forward, as much as lieth in you, quietness, peace, and love, among all Christian people, and especially among them that are or shall be committed to your charge?" *A.* "I will so do, the Lord being my helper."

It is with that solemn service and its promises in mind that I approach the decision I have to make, and, weighing carefully the particulars of the "negligence" which, as the judge has decided, has been proved, I am compelled to indorse the action provisionally taken by the Bishop, and to say, as I do say without hesitation, that the appointment of the curate in the manner provided for is, in the interest of the parishioners, right, and that the incumbent must be inhibited from performing all the ecclesiastical duties of the benefice. The interest of the parishioners—that is to say, the religious well-being of the parish as a whole—ought to be, in all cases, the paramount consideration, and I am glad that the law makes it possible effectively to give to that consideration its rightful place.

LORD COLERIDGE J. The appeal is dismissed with costs against the appellant, such costs to be taxed by the registrar to the Court.

Appeal dismissed.

Solicitors for appellant: *Montgomery, White & Harcourt, for E. D. Glanley, Newport Pagnell.*

Solicitors for respondent: *Heywood & Ram, for Small & Barker, Buckingham.*

NOTE (1).

Benefices Act, 1898, s. 9, sub-s. 1: "Where a Commission appointed in pursuance of section 77 of the Pluralities Act, 1838, as

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amended by the Pluralities Acts Amendment Act, 1885, and by this Act, reports that the ecclesiastical duties of a benefice are inadequately performed, and that this is due to the negligence of the incumbent of the benefice in the performance of those duties (which report the commission is hereby empowered to make), the bishop, if he thinks the appointment of a curate desirable, shall himself appoint a curate or curates, as in the said section mentioned, without requiring the incumbent to do so, and may also, if in his opinion the adoption of such a course is expedient in the interests of the benefice, inhibit the incumbent from performing all or any of those duties."

Benefices Act, 1898, s. 9, sub-s. 6: "The incumbent may appeal against the appointment of a curate by the bishop under this section and against any such inhibition to the court constituted under this Act within one month after such appointment or the issue of such inhibition. On any such appeal the judge shall determine whether the incumbent has been negligent as aforesaid, and the archbishop shall thereupon—

"(i.) if the judge finds that the incumbent has not been negligent as aforesaid, rescind the appointment and inhibition, if any; or

"(ii.) if the judge finds that the incumbent has been negligent as aforesaid, decide whether by reason thereof the said appointment should have been made, and also whether the incumbent should be inhibited from performing any and what ecclesiastical duties of his benefice;

and shall give judgment accordingly, and that judgment shall be final. Subject as aforesaid the provisions of section 3 of this Act with respect to procedure shall apply to proceedings under this sub-section." (See Benefices Act, 1898, s. 3, sub-s. 3, and ibid., s. 4.)

By the Benefices Act, 1898, s. 13, sub-s. 1, it is provided that in that Act "the expression 'benefice' comprehends all rectories with cure of souls, vicarages, perpetual curacies, endowed public chapels, and parochial chapelries, and chapelries or districts belonging or reputed to belong, or annexed or reputed to be annexed, to any church or chapel, and districts formed for ecclesiastical purposes by virtue of statutory authority, and includes benefices in the patronage of the Crown or of the Duchy of Cornwall, but does not extend to any of Her Majesty's Royal Chapels, or to any Royal peculiar, nor to any cathedral or capitular preferment or dignity, nor to any chapel belonging to any college, school, hospital, Inns of Court, asylum, or public or charitable institution, nor to any private chapel."

By the Benefices Act, 1898, s. 13, sub-s. 3: "In section 9 of this Act and in the Pluralities Act, 1838, and the Pluralities Acts Amendment Act, 1885, the expression 'ecclesiastical duties' shall, in all respects, include those duties mentioned in section 2 of the Pluralities Acts Amendment Act, 1885, and also the observance of all the promises as to conduct which every clergyman of the Church of England solemnly makes at the time of his ordination; and the expression 'negligence' in the performance

of ecclesiastical duties shall include wilful default in the performance of such duties."

The following extracts from the Service for the Ordering of Priests in the Book of Common Prayer set forth, so far as material to this report, the promises as to conduct which every clergyman of the Church of England makes at the time of his ordination as priest :—

"Then the Bishop shall say unto them [the persons to be admitted to the priesthood] as hereafter followeth."

. . . . . .

"And now, that this present Congregation of Christ here assembled may also understand your minds and wills in these things, and that this your promise may the more move you to do your duties, ye shall answer plainly to these things, which we, in the Name of God, and of his Church, shall demand of you touching the same.

"Do you think in your heart, that you be truly called according to the will of our Lord Jesus Christ, and the order of this Church of England, to the Order and Ministry of Priesthood ?

"*Answer.* I think it."

. . . . . .

"*The Bishop.* Will you then give your faithful diligence always so to administer the Doctrines and Sacraments, and the Discipline of Christ, as the Lord hath commanded, and as this Church and Realm has received the same, according to the Commandments of God ; so that you may teach the people committed to your Cure and Charge with all diligence to keep and observe the same ?

"*Answer.* I will so do, by the help of the Lord.

"*The Bishop.* Will you be ready, with all faithful diligence, to banish and drive away all erroneous and strange doctrines contrary to God's word ; and to use both public and private monitions and exhortations, as well to the sick as to the whole, within your Cures, as need shall require, and occasion shall be given ?

"*Answer.* I will, the Lord being my helper.

"*The Bishop.* Will you be diligent in Prayers, and in reading of the Holy Scriptures, and in such studies as help to the knowledge of the same, laying aside the study of the world and the flesh ?

"*Answer.* I will endeavour myself so to do, the Lord being my helper.

[The two next questions and answers are set out above in the judgment of the Archbishop of Canterbury.]

"*The Bishop.* Will you reverently obey your Ordinary and other chief Ministers, unto whom is committed the charge and government over you ; following with a glad mind and will their godly admonitions and submitting yourselves to their godly judgements ?

"*Answer.* I will so do, the Lord being my helper."

NOTE (2).

The report of the majority of the Commissioners, after reciting, inter alia, that the Commissioners had to "enquire whether the

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ecclesiastical duties of the benefice of Sympson were inadequately performed, including in such duties not only the regular and due performance of divine service on Sundays and Holy Days, but also all such duties as any clergyman holding a benefice is bound by law to perform, and the observance of all the promises as to conduct which every clergyman of the Church of England solemnly makes at the time of his ordination, and whether the inadequate performance (if any) of such duties was due to the negligence and wilful default of the Rev. W. Rice, the incumbent of such benefice, contained in substance, so ar as material, the following statements :—

"(2.) Fourteen witnesses were examined by the Commissioners, including the rector, the churchwardens and ex-churchwardens of Sympson, the registers and records of service, and careful attention given to the representations made on behalf of the rector by his counsel present at the meetings of the Commissioners.

"(3.) The population of Sympson at the last census was 624 souls, the area of the parish being about two miles by three-quarters of a mile, the people living at one end of the parish being more in touch with the neighbouring parish of Fenny Stratford and the population adjacent to Sympson Church being only 200 souls, or as estimated by the rector 100 souls.

"(4.) The Rev. W. Rice was instituted to the living in 1891. Under the incumbency of Mr. Rice's predecessor the church activities of the parish were satisfactory, but the congregations have now dwindled to an average of fifteen or twenty at the Sunday morning service including the choir; the services generally have been limited to Morning and Evening Prayers and Holy Communion, at mid-day once a month. There were also services on Christmas Day, Ash Wednesday, Good Friday, and Ascension Day, but not always on other Holy Days, and a weekday service in Lent. Early morning communions had been held at intervals, but intermittently and irregularly. In recent years children's Sunday school classes had been held. No candidate for confirmation had been presented by Mr. Rice for many years, and there was no systematic visitation of the sick or of the whole, though there was no case of a refusal to visit when sent for. Generally the Commissioners were satisfied that the church had lost its former hold on the people and the rector no longer retained any influence.

"(5.) This deplorable state of things was attributed to two causes: (*a*) The rector has subordinated his duties as a parish priest to his interests as a landowner and a farmer. He has been seen to walk through the village on Sunday evening with his sheep. In consequence the Commissioners are led to conclude of Mr. Rice's preoccupation with these secular matters his administrations in church have frequently been performed in a perfunctory manner. Witnesses described the prayers as 'gabbled through' so hastily and indistinctly that it was difficult for the congregation to join in the worship. This was denied by other witnesses, but the Commissioners found confirmation of it in the demeanour of the rector before them. Similar defects were betrayed

in Mr. Rice's preaching. Though some persons stated that they had heard good sermons from him, it is evident that his discourses were at times incoherent, having no connection with the text and rarely containing any reference to Church doctrine.

"(*b*) Secondly, Mr. Rice does not keep at peace with his neighbours. He is constantly in dispute with some one or other of them about petty matters such as land boundaries or rights of way. In the course of these disputes he has been known to attack persons in very intemperate language and with many alarming gestures. We have evidence of several such scenes in which Mr. Rice conducted himself in a manner quite unworthy of the character of a person in holy orders. The victims of these attacks have been men and women from all classes of the parish. Direct evidence was given of a number of such occurrences, and record was also produced before us of three cases in which Mr. Rice had been summoned for assault. The first of these, in 1895, was dismissed; the two others resulted in Mr. Rice being convicted and substantially fined. The most recent, heard April 22, 1915, was in respect of an assault upon a working woman in the parish. There were two counter-charges brought by Mr. Rice against the woman and her husband, but both were dismissed, and Mr. Rice was convicted and fined 2*l*. Mr. Rice has also been in frequent trouble with the local authorities and police in minor charges which have resulted in his being five times brought before the magistrates and fined. These latter cases, though unimportant in themselves, confirm our conviction that Mr. Rice's conduct has been such as to destroy his reputation as a law-abiding citizen. The evidence of the magistrates' clerk with respect to the register of convictions was objected to, but the objection was overruled.

"(6.) Evidence was also given of attacks from the pulpit. About five years ago Mr. Rice's sermon contained a reference to a parishioner clearly identified, and such reference was distinctly intemperate and improper. This sermon gave rise to a great deal of scandal.

"(7.) This course of conduct on the part of the incumbent of Sympson, which the Commissioners are satisfied has been continuous and persistent for many years past, is a direct contravention of his promises made at ordination."

The report concluded by reporting, as stated in the text, that the ecclesiastical duties of the benefice had been inadequately performed owing to the negligence and wilful default of Mr. Rice.

C. F. J.

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July 9, 23.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.
ADMIRALTY.

THE PETONE.

[1917, fol. 474.]

Admiralty—Maritime Lien—Transferability of Lien—Seamen's Wages and Master's Disbursements—Discharge of Lien by Volunteers after Vessel has been sold—Action in rem for Reimbursement—Doctrine of Subrogation.

Persons in the position of volunteers who make payments in discharge of seamen's wages and master's disbursements do not thereby acquire the maritime lien which the seamen and master had in respect thereof.

Quaere, whether, apart from the case of bottomry, a contractual assignment of a debt or claim supported by a maritime lien can carry with it the benefit of the lien.

Motion by the defendants, the owners of the steamship *Petone*, to set aside a writ in rem on the ground that the plaintiffs' cause of action gave them no lien or right of arrest; and for consequential relief.

The plaintiffs were William H. Watson & Co., of London. The defendants were the Petone Shipping Company, Limited, of Cardiff.

The writ was issued on June 13, 1917. The claim indorsed upon it was "for 865*l.* 1*s.* 2*d.* for payments made in discharge of seamen's wages, master's disbursements, and the passage of three of the officers home to New Zealand, and interest."

The præcipe for warrant of arrest was dated June 20, 1917, and the affidavit to lead the warrant deposed that the plaintiffs, on or about January 3, 1917, paid moneys to the master for wages of the crew and on account of disbursements made by him as master, and on or about January 25, 1917, paid moneys for the passages home to New Zealand of three of the officers of the vessel. The *Petone* was arrested, and on June 21, 1917, the defendants entered an appearance under protest. An undertaking to put in bail was given subject to the protest, and the ship, by consent, was released. The defendants now moved to set aside the writ on the ground that the plaintiffs' cause of action gave them no maritime lien and no right in rem independent of maritime lien.

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The following statement of the material facts, as appearing from the affidavits, is taken from the judgment:—The *Petone* was formerly owned by J. Montgomery & Co., of Christchurch, New Zealand, and was registered in Lyttelton, New Zealand. By agreement dated July 1, 1916, between J. Montgomery & Co. and Cunningham, Shaw & Co., Limited, of London, J. Montgomery & Co. agreed to sell the ship to Cunningham, Shaw & Co., Limited, the ship to be delivered in Lyttelton Harbour not later than August 31, 1916, and final payment to be made in Christchurch against bill of sale and delivery of the steamer. J. Montgomery & Co. agreed to engage the master and necessary officers and crew to bring the *Petone* to the United Kingdom, the purchasers paying 250*l.* per month for wages as from Durban until arrival in the United Kingdom, and half the cost (based on 250*l.* per month) for the time occupied from New Zealand until completion of discharge at Durban. J. Montgomery & Co. had liberty to carry cargo to Durban on their account, and were to supply the necessary coals and provisions as far as Durban.

The plaintiffs acted as agents of J. Montgomery & Co. in connection with this sale, and signed the agreement by telegraphic authority. The sale was completed, and Cunningham, Shaw & Co., Limited, resold the ship to the Coalition Shipping Company, Limited, of Cardiff, and transferred her by bill of sale dated January 9, 1917. The Coalition Shipping Company, Limited, resold the ship to the defendants, the Petone Shipping Company, Limited, and transferred her by bill of sale dated April 24, 1917. By that time her register had been transferred to London. Before this the ship arrived at Swansea on or about January 1, 1917.

The circumstances of the payments made by the plaintiffs, which are the subject of the action, are thus stated in the affidavit of Mr. W. Harold Watson, a member of the plaintiff firm: "The said ship arrived at Swansea on or about Jan. 1, 1917, but Cunningham, Shaw & Co., Limited, though requested so to do, did not pay the said wages in accordance with the said agreement; and to prevent the arrest of the ship by the master and crew my firm paid the wages, the subject of this action, and also the passage money of three of the officers home to New Zealand, which Messrs. Cunningham, Shaw & Co., Limited, had likewise agreed to pay, but did not pay. My

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firm made the payments in the bona fide belief that they were making the same in relief of the liability of Cunningham, Shaw & Co., Limited, under their agreement, and to save the ship from arrest as aforesaid."

July 9. *Dr. Stephens*, for the defendants. The maritime lien which the seamen and master have by statute in respect of wages and disbursements is not transferable. The *Petone* was sold before the institution of the action, and the plaintiffs, therefore, have no right to proceed in rem unless they have acquired a maritime lien. There is no authority for the proposition that a person who, without first obtaining the leave of the Court, has paid wages and disbursements, acquires the maritime lien which the seamen and master would have. When the leave of the Court to make the payments has been obtained the parties making the payments will be protected: *The Fair Haven*. (1) Unless the leave of the Court has first been obtained the Court will not entertain a subsequent application for reimbursement: *The Janet Wilson*. (2) See also *The Cornelia Henrietta* (3), where bondholders paid the seamen's wages and then applied to the Court to be reimbursed: Dr. Lushington assented to the application, which was unopposed, but pointed out that the proceedings were irregular and that the leave of the Court should have been obtained to make the payments. If the plaintiffs had a maritime lien leave would not be necessary and Dr. Lushington would not have made those observations. *The Tagus* (4), which at first sight appears to be an authority in the plaintiffs' favour, is not really so. In that case the master was allowed to recover against the res in priority to mortgagees in respect of disbursements made before he became master. But the action was well-founded because it was brought after the claimant had become master. If the observations of Phillimore J. mean that a person who is not a seaman acquires a maritime lien by reason of having paid off a seaman's claim for wages, then they are unsound and are contrary to the decision of Butt J. in *The Lyons*. (5) [*The John Fehrman* (6) was also referred to.]

(1) (1866) L. R. 1 A. & E. 67.
(2) (1857) Swab. 261.
(3) (1866) L. R. 1 A. & E. 51.
(4) [1903] P. 44.
(5) (1887) 6 Asp. M. L. C. 199.
(6) (1852) 16 Jur. 1122.

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Dumas, for the plaintiffs. The sole question is whether the Court has power to entertain an action in rem where the plaintiffs have paid off the claim of seamen in respect of wages, and *The Cornelia Henrietta* (1) is a direct authority in the plaintiffs' favour. In that case Dr. Lushington said that it had frequently been done, and Phillimore J. in *The Tagus* (2) made similar observations. Further, the decision in *The Tagus* (2) was before the Merchant Shipping Act, 1906, a comprehensive measure dealing with the whole subject of merchant shipping. The Legislature did not see fit in that Act to alter the effect of the decision, and the doctrine stated in that case, therefore, has the weight of statutory authority: see also *The Andalina* (3), where it would seem that Butt J. allowed a necessaries man who had paid the claim of a seaman in respect of wages to rank pari passu with the unpaid seamen.

The fact that in *The Tagus* (2) the claimant was rightly before the Court could not of itself give the Court jurisdiction. Because the Court has jurisdiction to entertain an action by a plaintiff asking for relief A as well as reliefs B and C, the Court is not thereby enabled to grant B and C unless actions in respect of B and C could have been entertained apart from A. The doctrine stated by Phillimore J. in *The Tagus* (2) is merely an application of the principles of subrogation. The plaintiffs are entitled to stand in the shoes of the privileged creditors whose claims they have satisfied, and the action should be allowed to proceed. [Pritchard's Admiralty Digest, 3rd ed., p. 811, was also referred to.]

D. Stephens in reply.

Cur. adv. vult.

July 23. HILL J. [Having stated the facts set out above his Lordship continued as follows:] It is immaterial to the present question to ascertain—what is not clear upon the affidavits—namely, whether the contract of the master and crew was with J. Montgomery & Co. or with Cunningham, Shaw & Co., Limited. Whichever it was, it was not with the defendants, and the wages became due before the defendants became owners.

For the purposes of to-day it must be assumed that the master

(1) L. R. 1 A. & E. 51. (2) [1903] P. 44.
(3) (1886) 12 P. D. 1.

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and crew had a maritime lien for wages and the three officers for their viaticum, and that the plaintiffs paid them off. The facts cannot be put higher than that in favour of the plaintiffs. It does not appear that there were any master's disbursements, unless the payment of the wages is treated as made by the master and the payment by the plaintiffs as a payment of the master's disbursements so made. It is, however, unnecessary to consider whether the circumstances were such as would give the master a lien for disbursements. The plaintiffs claim as having paid the men who had a wages lien, and the question of jurisdiction must be decided on that assumption. It may be that the plaintiffs also paid the master, who had a disbursements lien. But the payment of wages is sufficient, for that fact gives the plaintiffs a right to proceed in rem. I should add that it is not alleged that there was any constructive assignment by the seamen or the master to the plaintiffs of the debts due to them for wages or disbursements. What is alleged is that their claims were met out of moneys provided by the plaintiffs. Now, it is clear that the plaintiffs can only proceed in rem in this case if they are entitled to enforce a maritime lien, and it is not contended that they can have any right in rem except such as is founded upon a maritime lien ; none of the statutory provisions giving a right in rem apply to them.

The question is, Have they or can they enforce in their own name a maritime lien ? It is said that they can, because, having paid off the men who had a maritime lien for wages, the plaintiffs were entitled to stand in their shoes and enforce the maritime lien. And the decision of Phillimore J. in *The Tagus* (1) is said to conclude the matter. If that decision stood alone it would conclude the matter. It is a decision directly in point, and, apart from the respect which I should pay to a judge so experienced in Admiralty law and practice, I should be bound to follow it. In *The Tagus* (1) the ship was under arrest, and there were claims for wages and disbursements, and a mortgagee's claim. The master, before he became master, had been supercargo, and while supercargo had paid the crew's wages and made other disbursements. These he claimed, and he was allowed to recover against the res in priority to the mortgagee so much of those disbursements as were in respect of those wages.

(1) [1903] P. 44, 54.

Phillimore J. said: "There remains a question about the disbursements before he became master. In my opinion, if those disbursements are of the ordinary kind—port dues, coal bills, and so forth—he cannot claim them, and I so direct. I follow and concur in the decision in *The Albion* (1), so that if the whole disbursements are, as apparently they are, payment of wages of the crew, who might have seized the ship, then I think that the doctrine, that the man who has paid off the privileged claimant stands in the shoes of the privileged claimant, should be applied, and he has a lien for any disbursements made, although he was not master, in payment of the wages of the crew."

The Albion (1) is a decision only as to disbursements by one who subsequently became master, and the point of *The Tagus* (2) for the present purpose is that Phillimore J. acted upon a doctrine that one who pays off wages stands in the shoes of the seamen and has the seamen's lien.

On the other hand, there is a direct decision to the contrary in *The Lyons*. (3) In *The Lyons* (3) there was a mortgagee's suit against a foreign ship, and also an action by a necessaries man in respect of payments made before it had been finally settled in the case of *The Henrich Bjorn* (4) that the necessaries man had not a maritime lien even on a foreign ship. *The Lyons* (3) was heard after that decision. It was contended for the necessaries man that at least he was entitled to priority over the mortgagees in respect of sums paid for wages. Butt J., however, rejected that contention, and said: "That he is entitled to precedence in respect of these wages is a strong proposition, which I cannot accept."

In both these cases *The W. F. Safford* (5) was cited. In that case an American ship was arrested in a necessaries action and also in a bondholders' action, and, the ship having been sold by order of the Court, there were further suits against the proceeds by other necessaries men, of whom one, Da Costa, claimed as having paid crew's wages by direction of the master. Dr. Lushington gave priority to Da Costa first and to the bondholder next, and then to the others. He said: "A bond is intitled to precedence over all

(1) (1872) 1 Asp. M. L. C. 481.
(2) [1903] P. 44, 54.
(3) 6 Asp. M. L. C. 199.
(4) (1886) 11 App. Cas. 270.
(5) (1860) Lush. 69, 71.

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claims except wages, or a subsequent bond or salvage claim. Seamen's wages, however, come first of all, according to the established practice of the Court, and I am of opinion that Da Costa's claim is in the nature of wages, and must therefore be the first paid. If he had not advanced the money, the seamen would have no doubt arrested the ship, and enforced their right to priority of payment."

It will be seen later that in other decisions of Dr. Lushington both before and after *The W. F. Safford* (1) he took a contrary view. The only other case which supports the plaintiffs' contention is *The St. Lawrence* (2), where, in a competition between a bondholder and a necessaries man who claimed in respect of advances for wages, pilotage, dock dues, &c., to a foreign ship, it was conceded that the necessaries man was entitled to priority in respect of the sums advanced by him for wages and pilotage, but not for dock dues, and Sir Robert Phillimore held that dock dues were in the same category, and that the reasoning of *The W. F. Safford* (1) applied, and said: "I do not understand it to be disputed that a person who discharges claims of that character has the same rights and remedies for their recovery as the person to whom the money has been paid." In this case it will be seen that the doctrine in question was not disputed.

On the other hand, there are a series of cases in which the Court has refused to recognize the doctrine. In *The New Eagle* (3) there was a balance of proceeds in Court after satisfaction of a salvage claim, and this balance was claimed by mortgagees and by a Mr. Brambles, who claimed out of it 66*l.* advanced for seamen's wages, board, &c., on account of the ship. Dr. Lushington said: "When I first read the papers on which this motion was to be founded, I felt a strong disposition to support the claim of Mr. Brambles, so far as the law would enable me to do it, because the seamen had a right to resort to this Court, and take the body of the ship as the means of obtaining payment of their wages; but the law of this country has always struggled against such claims being allowed. I must be guided by the case of *The Neptune* (4), and I know of no principle recognized by the common law that allows any person, who has made advances on account of a ship, unless it be on bottomry, to come here and make a claim. After the case of *The Neptune* (4) it is

(1) Lush. 69.
(2) (1880) 5 P. D. 250, 253.
(3) (1846) 4 Notes of Cases, 426.
(4) (1834) 3 Hagg. Adm. 129.

very difficult to make a distinction between the proceeds and the ship itself. The proceeds may be paid to the mortgagees on the production of their deed."

Two years later, in *The Louisa* (1), on a motion for apportionment of agreed salvage, a Mr. Clarke applied that the judge would decree him repayment of certain advances which he had made to some of the salvors while acting for them as their agent in negotiating the salvage remuneration. Dr. Lushington refused and said: "The claim of Mr. Clarke is for the payment of a debt contracted solely upon the personal security of the salvors. In allowing him to convert that claim into a lien upon the property in the hands of the Court, I should I conceive not only be exceeding my proper jurisdiction, but I should in so doing establish a precedent that might be productive of serious consequences hereafter, in encouraging advances of money that would be highly detrimental to the interest of the salvors themselves, particularly to the mates and seamen."

Before and after these cases there were a number of cases in which, the res being under arrest, application was made to the Court on behalf of persons interested in the res, as bondholders or otherwise, for leave to pay off the crew, and cases in which the right to so pay without leave of the Court and the claim against the res was expressly denied.

In the 10th (1856) edition of Abbott, p. 538, Mr. Serjeant Shee, after stating in the text that "A maritime lien is not transferable and cannot be revived for the benefit of one by whom it has been discharged," adds the following note: "In cases of damage, that the res, often insufficient to compensate for the damage, may not be further burdened with the costs of mariners' suits, this rule has been relaxed by the present learned judge of the Court of Admiralty [i.e., Dr. Lushington], and the suitor (where there is no appearance for the owner) has been allowed to pay seamen's wages and claim in respect of them, and see in a case of bottomry *The John Fehrman*." (2)

The practice had been established before Dr. Lushington's day. The earliest instance which I have discovered is *The Kammerhevie Rosenkrants* (3), where Lord Stowell in 1822 granted an application on behalf of bondholders to permit them "to pay the wages of the

(1) (1848) 3 W. Rob. 99. (2) 16 Jur. 1122.

(3) (1822) 1 Hagg. Adm. 62.

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crew, in order to save the expense arising from their detention on board, and to decree that they should be reimbursed their advances out of the proceeds of the ship, prior to the satisfaction of any other claim thereon."

In *The John Fehrman* (1), a bondholders' action in which there was no appearance, the bondholders asked leave of the Court to pay wages, &c., and be repaid out of the proceeds of the ship and cargo when sold, and stated that in *The Corinthianer* (2) wages and pilotage had been paid by the bondholder in similar circumstances, and when the proceeds had been brought into the registry the Court allowed the repayment of the wages, &c., paid, but remarked that the payments had been irregularly made. Dr. Lushington granted leave upon the bondholders giving security in case the owners should hereafter think fit to contest.

In *The Janet Wilson* (3), a bondholders' action, an owner applied for payment out of the proceeds of moneys advanced by him for wages, pilotage, and disbursements before he was aware of the bond. Dr. Lushington refused, and said: "I thought I had established, in preceding cases, the rule that it was not competent to any person, without leave of the Court, to pay wages which might have been incurred, and then come to the Court and make application to have that money refunded. I thought I had declared in former cases that it was necessary application should be made to the Court prior to the time the money was paid, for leave to make such payment, and then the Court would judge of the circumstances."

The next case in order of date is *The W. F. Safford.* (4) The next is *The Cornelia Henrietta* (5), a bondholders' action, where, after arrest, the bondholder had paid wages and return passage moneys, and then applied that the sums so paid should be repaid out of the proceeds of the ship. There was no opposition. Dr. Lushington said: "Undoubtedly there has been an irregularity in this case. It has occurred before, and it is not the first time in which the Court has sanctioned the payment of money by way of wages to the parties without that consent which ought to have been had upon application to the Court. Looking at all the circumstances of the

(1) 16 Jur. 1122.
(2) November 5, 1851, unreported.
(3) Swab. 261.
(4) Lush. 69.
(5) L. R. 1 A. & E. 51.

case, I think I ought not to withdraw my late approbation of what has been done . . . . but I wish most expressly to declare that this is a practice I cannot in future sanction. . . . ." And again: "If in future times an attempt is made after the warning that has been given, the parties will do it at their peril." Another instance of leave obtained by bondholders will be found in *The Fair Haven*. (1)

Notwithstanding *The W. F. Safford* (2), it must, I think, be taken that the considered opinion of Dr. Lushington was that no one had a right to pay off wages and thereby give himself a right against the ship. Upon whatever ground of convenience the bondholder or other person was allowed to pay off wages and claim against the ship, the fact that the leave of the Court was necessary is quite inconsistent with any doctrine that he who pays off wages stands in the shoes of and has the maritime lien of the seamen. If that right existed, Dr. Lushington's warning was an empty threat.

Coming to Sir Robert Phillimore's time, I have already mentioned *The St. Lawrence*. (3) Before that, in *The Bridgwater* (4), a bondholders' action, the bondholders applied for and were granted leave to pay off the crew out of freight in their hands, it being stated that they could not do it without the order of the Court.

I cannot find any reported case in which Sir James Hannen dealt with the matter, but in addition to *The Lyons* (5) Butt J. had the point in question before him in *The Andalina* (6), and dealt with it in a way which in my view is inconsistent with the alleged doctrine. In that case there were actions for wages by part of the crew and actions by necessaries men. One of these, Meek, claimed in respect of sums paid for towage, light dues, and wages to a seaman. The matter came before the Court on a motion by the crew for payment out of Court of the amount claimed for wages. *The W. F. Safford* (2) was cited. Butt J. said: "With regard to Meek's claim, I am of opinion that no part of it can rank before the claim of the seamen for wages. . . . . With regard to payment of light and dock dues, I think that Meek's claim ranks after that of the seamen." It is said by counsel for the plaintiffs that this means that Meek's claim ranked pari passu with the seamen; but at the end

(1) L. R. 1 A. & E. 67.
(2) Lush. 69.
(3) 5 P. D. 250.
(4) (1877) 3 Asp. M. L. C. 506.
(5) 6 Asp. M. L. C. 199.
(6) 12 P. D. 1, 3.

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of the judgment Butt J. said: "Therefore the seamen have the priority I have already stated; as to priorities between the other claimants I say nothing; it is sufficient for to-day to decide the question raised by the present motion on behalf of the mate and seamen." What that means is that Meek should not stand in the shoes of the seamen he had paid; he was left with his necessaries lien (*The Andalina* was a foreign ship, and the decision was before *The Henrich Bjorn* (1)), and Butt J. did not decide whether the fact that some of the necessaries were payment of wages gave Meek any priority over other necessaries men.

These, I believe, are the cases. For the view of the more modern text-writers I may refer to the 13th edition of Abbott, p. 883, the 14th edition, p. 1035, and vol. 26 of Halsbury's Laws of England, p. 625. They treat maritime liens, other than liens for bottomry, as not transferable.

In my view the weight of authority is strongly against the doctrine that the man who has paid off the privileged claimant stands in the shoes of the privileged claimant and has his lien, whether it be regarded as a general doctrine or as applied to wages only.

I say nothing about contractual assignments of debts or claims supported by maritime liens. It is not necessary to consider how far such an assignment carries with it in all cases the maritime lien; it does so in the case of bottomry; whether it does so in any other cases it is not necessary to express an opinion. In the present case there is no question of assignment. The plaintiffs paid the wages and/or disbursements. The master and crew have been paid and their debts satisfied. They assigned nothing to the plaintiffs. The plaintiffs do not claim as their assignees but in their own right as having paid the men off. Counsel for the plaintiffs contends that the doctrine is an application of the principle of subrogation. But I know of no principle of English law which says that one who, being under no compulsion and under no necessity to protect his own property, but as a volunteer, makes a payment to a privileged creditor, is entitled to the rights and remedies of the person whom he pays. That is the position of the plaintiffs. They chose as volunteers to pay off debts which constituted a marine lien upon the ship. They did not, in my opinion, thereby acquire any

(1) 11 App. Cas. 270.

maritime lien. They have, therefore, no right in rem based upon a maritime lien. They have no right in rem independent of a maritime lien.

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The result is that the writ, arrest, and appearance must be set aside and the bail discharged. The plaintiffs must pay the costs of the action and of this motion.

The notice of motion also asks that they be ordered to pay the loss and expense occasioned by the arrest. But I should only do so by way of damages for wrongful arrest (i.e., for arrest without reasonable and probable cause), but in view of the conflict in the authorities I do not find an absence of reasonable and probable cause.

Leave to appeal.

Solicitors for applicants (defendants): *Stokes & Stokes, for Allen Pratt & Geldard, Cardiff.*

Solicitors for respondents (plaintiffs): *Metcalfe, Sharpe & Hay.*

E. C. T.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

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July 14, 16, 23.

THE PENRITH CASTLE.

[1916, fol. 598.]

Admiralty—Collision—Pilotage—Portsmouth Public Traffic Regulations, 1915—*Defence of the Realm (Consolidation) Regulations*, 1914, *regs.* 36 *and* 39—*Responsibility for Pilot's Negligence.*

The plaintiff's steamship *D.*, while at anchor in Ryde Roads, was damaged by the defendants' steamship *P.*, which had been shifting her anchorage and had dragged down on to the *D.* The collision was solely due to the negligence of the pilot on the *P.* in letting go her anchor in an improper place. The pilot had gone on board under the instructions of the Chief Examination Officer, acting under the King's Harbour-master at Portsmouth, in order to shift the *P.* as she had dragged into the fairway.

It was argued on behalf of the defendant shipowners that under the Portsmouth Public Traffic Regulations, 1915, pilotage was compulsory; and, further, that, whether pilotage was compulsory or not, the pilot was sent on board the *P.* and was in charge of her

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by an order of the competent naval authorities made under reg. 36 of the Defence of the Realm (Consolidation) Regulations, 1914, and was not acting as a servant or agent of the owners so as to make them responsible for his negligence. Reg. 36 provides that: "If the master of a ship, or any other person, disobeys or neglects to observe any regulations relating to the navigation or mooring of ships in a harbour or the approaches thereto, or any signals from, or any orders, whether verbal or written, of the competent naval or military authority of the harbour, or any examining or other officer acting under his authority, relating to such navigation or mooring, he shall be guilty of an offence against these regulations":—

Held: (1.), that there was nothing in any of the Portsmouth Public Traffic Regulations which put any compulsion upon the *P.* to take a pilot, and that neither the King's Harbour-master, nor the Commander-in-Chief, Portsmouth, by whose order the regulations were made, was the authority having power to make orders as to pilotage, which under reg. 39 of the Defence of the Realm (Consolidation) Regulations, 1914, was "vested in the Admiralty or Army Council or any pilotage authority acting under their instructions"; but, (2.), that, although pilotage was not compulsory, the pilot was in charge of the *P.* by an order of the Chief Examination Officer given under the powers of the Defence of the Realm (Consolidation) Regulations and was in no sense the servant of the defendants, and that the defendants were not liable for his negligence.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Drumcliffe;* the defendants were the owners of the steamship *Penrith Castle.*

The collision took place about 3.30 P.M. on March 28, 1916, in Ryde Roads. The *Drumcliffe*, a screw steamship of 4073 tons gross, bound from London to Barry Roads in water ballast, was at anchor off Ryde Pier. The *Penrith Castle*, a screw steamship of 3663 tons gross, bound from London to Baltimore in water ballast, had come to an anchor off Ryde the previous day, but had dragged into the fairway during the night, and a pilot was sent by the Chief Examination Officer, acting under the instructions of the King's Harbour-master, to move her into a proper anchorage again. She was moved away and her anchors were let go, but they failed to hold, and she drove on to the *Drumcliffe.*

The defendants alleged that the *Penrith Castle* was driven on to the *Drumcliffe* by the force of the wind, which they alleged was blowing a gale from the north-west with hurricane squalls; and that

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the collision was the result of an inevitable accident and could not have been avoided by the exercise of ordinary care, caution, and maritime skill on the part of the defendants or their servants. By an amendment to the defence the defendants further pleaded that the negligence, if any, was that of the pilot, and that he was in charge of the *Penrith Castle* by compulsion of law.

On July 14, 1917, Hill J. decided against the plea of inevitable accident and reserved the question of pilotage for further consideration.

By reg. 11 of the Portsmouth Public Traffic Regulations of June 15, 1915, issued by order of the Commander-in-Chief, Portsmouth, under the Defence of the Realm (Consolidation) Regulations, 1914, "the movement of all merchant vessels . . . . are subject to the direction of the King's Harbour-master, Portsmouth . . . . whose orders are to be immediately obeyed." Reg. 20 provides that: "It is compulsory for all incoming merchant vessels . . . . to have a licensed pilot on board when entering the inner defence area—from the Examination Anchorage until the vessel has passed between the hulks marking the gateway between Horse Sand and Noman's Forts. Pilotage is not compulsory when leaving by the eastern entrance, except at night, but merchant vessels which have received permission to leave by the Needles channel must have a sea (outward) pilot from Southampton on board." By reg. 36 of the Defence of the Realm (Consolidation) Regulations, 1914, "If the master of a ship, or any other person, disobeys or neglects to observe any regulations relating to the navigation or mooring of ships in a harbour or the approaches thereto, or any signals from, or any orders, whether verbal or written, of the competent naval or military authority of the harbour, or any examining or other officer acting under his authority, relating to such navigation or mooring, he shall be guilty of an offence against these regulations."

July 16. *Laing, K.C.*, and *John Bridge Aspinall*, for the defendants. Under regs. 11 and 20 of the Portsmouth Public Traffic Regulations the *Penrith Castle* had to take a pilot when shifting out of the fairway. The pilot who went on board to move her was acting under the verbal instructions of the competent naval authority, the King's Harbour-master at Portsmouth, and the

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master of the *Penrith Castle*, in accordance with reg. 36 of the Defence of the Realm (Consolidation) Regulations, had to obey his instructions, and would have been guilty of an offence under the Defence of the Realm Act, 1914, if he had refused. Whether pilotage was compulsory on the *Penrith Castle* under the Portsmouth Public Traffic Regulations or not, the pilot was in charge of her by order of the naval authorities, and was not acting as the servant or agent of the defendants so as to make them responsible for his negligence: see *The Halley*. (1)

Bateson, *K.C.*, and *D. Stephens*, for the plaintiffs. Under the Defence of the Realm (Consolidation) Regulations compulsory pilotage is dealt with by reg. 39. Reg. 36 does not empower the Commander-in-Chief, Portsmouth, to promulgate orders making pilotage compulsory, for reg. 39 expressly provides that pilotage orders shall be made by three authorities only. Neither the King's Harbour-master nor the Commander-in-Chief at Portsmouth is the competent pilotage authority; the Trinity House is the pilotage authority for the Portsmouth district. Moreover, the order to the pilot to shift the *Penrith Castle* was not an order under reg. 36. It was not written, and a verbal order, it is submitted, must be given by the officer himself. The *Penrith Castle*, therefore, was not bound to take a pilot. The pilot sent to her merely had to see that the instructions of the King's Harbour-master were carried out and that the vessel shifted. The master could not have been punished if he had shifted the vessel himself; he was not bound to put her in charge of the pilot; and if there is no penalty for refusing to employ a pilot, pilotage is not compulsory: *S.S. Beechgrove Co.* v. *Aktieselskabet Fjord of Kristiania*. (2) It follows, therefore, that if the master was not bound to hand over the command of his vessel to the pilot, but in fact did so, the defendants are responsible for the pilot's negligence.

Cur. adv. vult.

July 23. HILL J. read the following judgment:—The collision in this case happened about 3.30 P.M. on March 28, 1916. The *Drumcliffe* is a vessel of 4072 tons gross and 374 feet long. She was

(1) (1868) L. R. 2 P. C. 193, 202. (2) [1916] 1 A. C. 364.

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in ballast and was at anchor to a single anchor in Ryde Roads. The *Penrith Castle*, a vessel of 3663 tons gross and 361 feet long, had on March 27 come to anchor in Ryde Roads, and during the night, in heavy weather, had dragged towards Gilkicker Point. On the morning of March 28 she found herself safely at anchor in good anchorage ground, but in the fairway. Being there she was ordered by the naval authorities to move, and a pilot, named Holmes, was sent on board to move her out of the fairway and to an anchorage. Holmes, in fact, took charge to bring her to an anchorage. Before she was brought safely to anchor she collided with the *Drumcliffe*.

The defendants pleaded inevitable accident, and by an amendment made on January 17, 1917, compulsory pilotage, namely, that the negligence, if any, was solely that of a duly licensed pilot in charge by compulsion of law. I have already expressed my view as to the plea of inevitable accident. I think this is not made out. There was nothing in the circumstances of the weather, at most a fresh gale, which made it impossible for the *Penrith Castle* to be brought to an anchor in safety to herself and to the *Drumcliffe* had reasonable care and skill been used. It was not used. I have also already expressed my view that the fault was the fault of Holmes alone. He let go the anchor in an improper place as regards the *Drumcliffe*. The plaintiffs' witnesses and the master of the *Penrith Castle* agree that when the anchor was let go the *Penrith Castle* was much too near the *Drumcliffe*. It is suggested that it was so let go, not by the orders of Holmes, but by some blunder of the crew. That is contrary to all the evidence from the *Penrith Castle*, including the evidence of Holmes, and I see no reason to suppose there was any blunder except the blunder of Holmes.

That leaves the difficult point as to whether the defendants are liable for the fault of Holmes. The facts are these: Ryde Roads, where the collision happened, as well as the fairway, from which the *Penrith Castle* was shifted, are within the defence area of Portsmouth, and are within the inner defence area as described in the Public Traffic Regulations for the defence area, dated June 15, 1915. Both places are also either within the harbour of Portsmouth or within the approaches to the harbour. I was not told the limits of the harbour, but, if those places are not within the harbour, I

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have no doubt that both places are within the approaches to the harbour. If he had been left to himself the master of the *Penrith Castle* would not have shifted his anchorage. The anchorage was shifted under the orders of the Chief Examination Officer stationed at St. Helens, who was acting under the authority of the King's Harbour-master. The King's Harbour-master is the competent naval authority of the harbour of Portsmouth. The general pilotage authority for the area in question is the Trinity House, and Holmes was a duly licensed Trinity House pilot for that area. He was also one of several Trinity House pilots specially licensed by the King's Harbour-master to "pilot merchant vessels in that portion of the Portsmouth defence area for which you hold a licence from Trinity House." These special pilots, and only these, are made acquainted with the special defences of the port.

Besides the *Penrith Castle* other vessels dragged during the storm of March 27—28, and were on March 28 lying in the fairway. On March 28 the Chief Examination Officer gave orders to the special pilots to shift these ships back into the anchorage off Ryde out of the fairway. Holmes went on board the *Penrith Castle* and told the master that he had orders to shift him into the proper anchorage. The master objected to shift. Holmes told him that he was under orders from the naval authorities and must shift him. The master then gave up charge to Holmes, and Holmes remained in charge until the collision. The owners were charged and paid a fee for "transporting the *Penrith Castle* from Stokes Bay to Mother Bank," not for pilotage outside or inwards.

Counsel for the defendants contends (1.) that pilotage was compulsory, and Holmes was compulsorily in charge as pilot, and the defendants have the protection of s. 633 of the Merchant Shipping Act, 1894, and (2.) that, whether pilotage was compulsory on this ship in the circumstances or not, Holmes, by order of the naval authorities, which he and the master were alike compelled to obey, was in charge of the ship, and was not acting as servant or agent of the owners so as to make them responsible in law for his negligence. Counsel relies, first, on regs. 11 and 20 of the Portsmouth Public Traffic Regulations of June 15, 1915, and, secondly, on reg. 36 of the Defence of the Realm (Consolidation) Regulations.

First, as to regs. 11 and 20 of the Portsmouth Public Traffic

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Regulations. I do not think they apply. Reg. 11 has to do, not with pilotage, but with movements of vessels. I have no doubt that the order to shift was within the regulation and that the regulation was within reg. 36 of the Defence of the Realm (Consolidation) Regulations, and I have no doubt that the master was bound to obey the order to shift, and would have committed an offence under the Defence of the Realm Act if he had not obeyed it. But that did not place him under any compulsion to put the ship in the charge of any one else. Reg. 20 does not, in my opinion, apply to the transporting of a vessel from one part of the harbour to another. The *Penrith Castle* was neither entering the inner defence area nor leaving it at night. I find no order specially dealing with pilotage which put any compulsion upon the *Penrith Castle*. I should add that, apart from the Defence of the Realm (Consolidation) Regulations (reg. 36 of which I will consider later), there is no power under the Defence of the Realm Act for the King's Harbour-master to make pilotage compulsory. The Defence of the Realm regulation which deals with compulsory pilotage is reg. 39, and by it the power to make orders as to the pilotage of vessels entering, leaving, or making use of any port or navigating within any part of the territorial waters adjacent to the United Kingdom "is vested in the Admiralty or Army Council, or any pilotage authority acting under their instructions." Neither the King's Harbour-master nor the Commander-in-Chief, Portsmouth, by whose order the Public Traffic Regulations are expressed to be made, is the Admiralty or the Army Council, or pilotage authority acting under their instructions. As I have said, the pilotage authority for this district is the Trinity House.

For these reasons I do not think that there was any regulation which made pilotage compulsory on the *Penrith Castle*.

That disposes of the plea, but it does not at all dispose of the case. There remain the questions whether Holmes was in charge of the *Penrith Castle* by an order of the Chief Examination Officer given under the powers of reg. 36 of the Defence of the Realm (Consolidation) Regulations, and, if he was, what is the effect in law of his negligence upon the liability of the owners. The first question is partly of fact and partly of law.

As to fact, was the order an order that the ship should be shifted

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and that Holmes should see that that was done, leaving it to the master to put Holmes in charge of the navigation or not, as he pleased, or was it an order that Holmes should take charge of the navigation in the same way as if he had been piloting an entering ship? I do not think that the order was one with which the master could comply by himself taking charge and navigating the ship to a new anchorage. Was that an order within reg. 36? It is said that it was not, for it was not written, and "verbal" means given by word of mouth by the officer himself, and Holmes was not an officer. I do not agree. I think it was a verbal order of the officer, communicated to the master by Holmes as the messenger. Being an order under the Defence of the Realm Act, disobedience would subject the master to the penalties of the Act. In my opinion reg. 36 is intended to and does make the authorities therein named supreme over all matters of the mooring and navigation of vessels in a harbour or the approaches thereto, and this includes the power to compel those whom the owners have put in charge of the ship to put it in charge of any one who is ordered to take charge by these authorities. I hold that the master was compelled to put the *Penrith Castle* in charge of Holmes.

If that is the true position, can the owners be liable for Holmes's fault? In *The Maria* (1) Dr. Lushington said that apart from statutory exemption the owners were not responsible for the acts of persons to whom they were enforced to commit the management of their property and over whom they had no control; and in *The Ticonderoga* (2) Dr. Lushington said the principle on which the owner is relieved from paying damage done by the fault of the pilot is that the pilot is not the servant of the owner, but is forced upon him by Act of Parliament. If this is the common law, then it is only what is provided by s. 633 of the Merchant Shipping Act, 1894, and I suppose s. 15 of the Pilotage Act, 1913, when it comes into force, will alter the common law. In the circumstances I have found, did the relationship of master and servant exist between the owners and Holmes? The common law is thus stated in *The Halley* (3), a statement which is referred to without dissent in *S.S. Beechgrove Co.* v. *Aktieselskabet Fjord of Kristiania* (4): "The

(1) (1839) 1 W. Rob. 95.
(2) (1857) Swab. 215.
(3) L. R. 2 P. C. 202.
(4) [1916] 1 A. C. 364.

tort for which damages are sought to be recovered in this cause was a tort occasioned solely by the negligence or unskilfulness of a person who was in no sense the servant of the appellants, a person whom they were compelled to receive on board their ship, in whose selection they had no voice, whom they had no power to remove or displace, and who, so far from being bound to receive or obey their orders, was entitled to supersede, and had, in fact, at the time of the collision, superseded, the authority of the master appointed by them; and their lordships think that the maxim 'qui facit per alium, facit per se' cannot by the law of England be applied, as against the appellants, to an injury occasioned under such circumstances; and that the tort upon which this cause is founded is one which would not be recognised by the law of England as creating any liability in, or cause of action against, the appellants."

That principle applies to this case and establishes a defence. There must be judgment for the defendants, but it will be without costs.

Solicitors for plaintiffs: *Lightbound, Owen & Co., Liverpool.*
Solicitors for defendants: *Weightman, Pedder & Co., Liverpool.*

E. C. T.

1917
June 28;
July 26.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(In Prize.)

THE ACHILLES.

[1915, No. 809.]

Prize Court—Enemy Goods—Trading between British and Neutral Branches of Enemy Firm—Trading with the Enemy Proclamation (No. 2)—Licence to Trade—Correspondence with Trading with the Enemy Committee—Goods landed ex British Ship—Seizure in Warehouse—Limits of Port of Liverpool.

After the outbreak of war a quantity of hides were shipped on a British vessel by the Bangkok branch of an Austrian company consigned to the company's branch in Manchester. The hides were landed in Liverpool and stored in a warehouse in Argyle Street, Liverpool, where they were seized as prize.

By par. 6 of the Trading with the Enemy Proclamation (No. 2) of September 9, 1914, "where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy."

It was contended (1.) that this paragraph and/or certain correspondence between the manager of the Manchester branch and the Trading with the Enemy Committee constituted a licence to the Manchester and Bangkok branches of the enemy company to trade; and (2.) that the warehouse in Argyle Street was outside the limits of the port of Liverpool, and that on these grounds the goods were immune from confiscation:—

Held, first, that par. 6 of the Trading with the Enemy Proclamation (No. 2) gave no protection to the goods. It afforded protection to a person acting within it from being convicted of the offence of trading with the enemy, but it had no application to the case of the transfer of goods belonging to an enemy from one branch house to another so as to affect the property in the goods, and could not be construed as taking away the right to seize enemy goods on a British ship or in a British port; secondly, that a licence from the Crown must be strictly construed and proved, and that the Trading with the Enemy Committee neither had the authority to give a licence which would defeat the rights of captors, nor purported to give such a licence; and, thirdly, that the warehouse was a warehouse of the port of Liverpool, and on that ground, therefore, and on the broader ground that goods which had been subject to capture as enemy property while afloat remained subject to seizure when landed, that the hides were confiscable as prize.

Application by the Procurator-General on behalf of the Crown for the condemnation as prize of 226 bales of hides.

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The hides were shipped at Bangkok on the British steamship *Achilles* by the Bangkok branch of an Austrian company, Alois Schweiger & Co., Limited, which had a number of branches in the East as well as a branch at Manchester. The hides had been ordered by the manager of the Manchester branch, Mr. Kempton, after correspondence with the Trading with the Enemy Committee.

From the affidavit of Mr. Kempton it appeared that he was anxious that no breach of the law against trading with the enemy should be committed by him or by the Manchester branch, and accordingly on September 12, 1914, he wrote a letter to the Trading with the Enemy Committee. In this letter he stated that the head office of the company (which was a private concern having no shareholders) was at Vienna, and that the whole of the capital required for all the branches was supplied by the Creditanstalt for Industry and Commerce of Vienna. He further stated that the business of the Manchester branch consisted of the purchasing of Lancashire and Yorkshire goods for shipment to the various branches; that for some time the branch had also imported dried hides from the branches in the East for sale to firms in the United Kingdom; that the proceeds of sale were solely utilized for the payment for the goods purchased; and that no remittances were or had been made to the Vienna office even in peace time. The letter continued as follows: "These are the facts, and as we understand the present position of affairs it is open to us to continue business. We are anxious to carry on but only if in doing so we are not infringing the law. We shall esteem it a favour, therefore, if you will kindly afford us your views in this matter." The reply from the secretary of the Trading with the Enemy Committee was as follows: "In reply to your letter of the 12th inst. I beg to say that from the facts stated it would appear that there is no reason why the Manchester branch of Messrs. Alois Schweiger & Co., Ltd., should not continue business as usual. I would refer you to par. 6 of the Royal Proclamation on Trading with the Enemy of the 9th inst." (1)

(1) Trading with the Enemy Proclamation (No. 2), par. 6: "Provided always that where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy."

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Some further correspondence passed, but it was subsequent to the shipment of the goods in question.

On October 26, 1914, Mr. Kempton telegraphed to the Bangkok branch for some hides to be shipped, and accordingly in November 238 bales were shipped on the *Achilles*, consigned to Liverpool. On the arrival of the *Achilles* at Liverpool on January 15, 1915, twelve bales of hides were delivered from the quay to three purchasers, and the remaining 226 bales were put into a warehouse of the Liverpool Warehousing Company at 452, Argyle Street, Liverpool, on behalf of Alois Schweiger & Co., Limited. On February 22 the Customs Authorities served a notice of provisional detention, and the goods were subsequently placed in the custody of the Admiralty Marshal. On November 18, 1915, a writ in prize was issued. On March 30, 1916, the Manchester branch was ordered to be wound up, and on May 25, 1916, the controller appointed by the Board of Trade filed a claim on behalf of Alois Schweiger & Co., Limited, in order to test whether the goods belonged to the assets of the branch or whether they were enemy assets confiscable as droits of admiralty.

The claimant alleged that the goods having been put into a warehouse in Argyle Street, Liverpool, were outside the port of Liverpool for the purpose of seizure as maritime prize, and an affidavit by the chief clerk in the Leasing Department of the Town Clerk's Office, Liverpool, was filed, from which it appeared that the site of the warehouse was never part of the old port of Liverpool and was not within the limits of the present port of Liverpool. The claimant further alleged that the goods were immune by reason of par. 6 of the Trading with the Enemy Proclamation (No. 2) of September 9, 1914 (1), and also that the correspondence which passed between Mr. Kempton and the Trading with the Enemy Committee constituted a licence to import the hides.

June 28. *Sir Frederick Smith, A.-G.*, and *Austen-Cartmell*, for the Procurator-General. The Argyle Street warehouse is a warehouse of the port of Liverpool. If the limits suggested by the claimant are taken strictly very few of the wharves would be within the port of Liverpool. But the point is really immaterial; the

(1) See note (1), p. 219, ante.

goods are the subject of maritime seizure, and can be condemned as droits of admiralty even if no longer within the limits of the port at the time of seizure: *The Roumanian*. (1)

No licence to trade which could defeat the rights of the Crown was given to the Manchester branch. The letters of the Trading with the Enemy Committee merely give a more or less valuable opinion, and do not give, or purport to give, a licence to import the goods. Par. 6 of the Trading with the Enemy Proclamation (No. 2) does not constitute a permit legalizing trading between two branches of an enemy firm: see *The Eumæus*. (2) The hides are enemy property and should be condemned.

Leslie Scott, *K.C.*, and *Latter*, for the claimant. The goods were not seized within the limits of the port of Liverpool. The decision of the Privy Council in *The Roumanian* (1) is distinguishable. The effect of that decision is that where goods are driven to land by the exercise of belligerent sea power, although not necessarily by force (*British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (3)), the right to seize as prize follows them even if they are no longer within the limits of the port; but where the goods are landed, not by reason of the exercise of sea power, but, as in the present case, in the ordinary course of a commercial adventure and are taken outside the limits of the port before seizure, it is then too late for the Crown to attempt to seize the goods.

Both the Bangkok and the Manchester branches of the Austrian company are "branches" within the meaning of par. 6 of the Trading with the Enemy Proclamation (No. 2), and the transaction cannot be treated as one by or with an enemy. Par. 6 constitutes a general licence by the Crown to branches of an enemy firm within the meaning of the paragraph to trade, and therefore is an intimation that a British Prize Court will not seek condemnation of goods brought to this country pursuant to the Proclamation; otherwise the Proclamation would be a deception and a fraud. As to the effect of such a licence, see *Usparicha* v. *Noble*. (4) No special licence, therefore, to import the goods was necessary, but if it was, the letters to the manager of the Manchester branch from the

(1) [1916] 1 A. C. 124. 605.
(2) (1915) 1 Br. & Col. P. C. (3) [1916] 1 A. C. 650.
(4) (1811) 13 East, 332.

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Trading with the Enemy Committee must be treated as advice given by the Crown and operative as a Crown licence.

Sir Frederick Smith, A.-G., replied.

Cur. adv. vult.

July 26. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—After the outbreak of war the Manchester branch of a Vienna company—Alois Schweiger & Co., Limited—was placed under a controller appointed by the Board of Trade. The claim in this case is made by the controller, who desires the question which arises to be decided by the Court. The subject-matter of the claim is a quantity of hides, consisting of 226 bales. These bales were shipped from the Bangkok branch of the Austrian company on the *Achilles*, a British ship bound from Bangkok to Liverpool. This was done on the instructions of Mr. Kempton, the manager of the Manchester branch. Mr. Kempton had some communication with the Trading with the Enemy Committee, set up by the Treasury, as to carrying on the business of the branch. No complaint whatever is made of the conduct of Mr. Kempton in reference to the shipment in question, or to any other matter in connection with the business of the Manchester branch after the war began.

The material facts in the case are not in dispute. They can be shortly stated. It was admitted that the hides when afloat, and when they arrived in Liverpool, were the property of the enemy company. After their arrival they were discharged and placed in a Liverpool warehouse near the docks. They were seized in that warehouse.

Two contentions were put forward as grounds for the application to release the goods: First, it was said that they were seized on land outside the port of Liverpool. Secondly, that either by virtue of par. 6 of the Trading with the Enemy Proclamation (No. 2), dated September 9, 1914, or by a licence from the Crown, the goods were immune from confiscation.

As to the first point, the matter is concluded by the decision in *The Roumanian*. (1) Some evidence was given as to the limits of the old port of Liverpool. If that evidence was strictly acted upon,

(1) [1916] 1 A. C. 124.

it would appear that most of the great docks on the eastern bank of the Mersey would have to be excluded from the port. In my view the warehouse where the hides were seized was a warehouse of the port of Liverpool, and on this and on the broader ground stated by the Judicial Committee of the Privy Council in *The Roumanian* (1), the goods which had been subject to capture as enemy property while afloat remained subject to seizure in the warehouse.

Upon the second point, as to the suggested licence, the contention fails on both branches of the argument. Par. 6 of the Proclamation, already referred to, gives no licence or protection for the goods in question. That provision affords a protection for a person acting within it from being affected with the offence of trading with an enemy. It has no application to the case of the transfer of goods belonging to an enemy from one branch house to another so as to affect the property in the goods. In a word, the provision protects a person trading within its purview, but leaves untouched the question of title to or property in any goods; and it cannot possibly be construed as taking away from a captor the right to capture or seize enemy goods on a British ship or in a British port.

As to the argument that the correspondence passing between Mr. Kempton and the Trading with the Enemy Committee constituted a licence which made the goods immune from seizure, the contention is also without foundation. There are many old authorities in the Prize Courts of this realm upon questions of licence. They establish that an alleged licence must be strictly proved, and also that it must be strictly construed. It is clear that the committee referred to had no authority to give a licence which could defeat the right of captors; and it is in my opinion equally clear that they never purported to give any such licence.

It was said that Mr. Kempton desired to get possession of the goods so as to satisfy the claims of British creditors against the Austrian company. That does not affect the question I have to decide. If the proceeds of the goods were so applied, the enemy company would pro tanto be relieved of their obligations to those creditors. Moreover, it was not shown to the Court that the other assets of the Manchester branch were not sufficient to satisfy the demands of all the British creditors. However that may be,

(1) [1916] 1 A. C. 124.

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the legal position, in my opinion, is clear. But the controller was quite justified in seeking the decision of the Court.

That decision is that the goods in question, in the circumstances, were properly seized; and the order of the Court is that they be condemned as good and lawful prize in favour of the Crown in its rights to droits of admiralty.

Solicitor for the Procurator-General: *The Treasury Solicitor.*

Solicitors for the claimant: *Busk, Mellor & Norris, for Slater Heelis & Co., Manchester.*

E. C. T.

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June 21, 22; *July* 31.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

THE CARRIE.

[1917, fol. 175.]

Admiralty—Salvage—Neutral Vessel—Cargo of Munitions for the French Government—Services rendered by British armed Trawlers—Claim for Salvage Remuneration by Officers and Crew—War Risks and Marine Risks—Protection against Submarine Attack—Towage of abandoned Vessel.

A Swedish vessel, laden with a cargo of munitions for the French Government, was stopped in the English Channel by a German submarine and the crew were ordered to take to the boats. The submarine was preparing to sink the vessel, but submerged, presumably on sighting two of His Majesty's armed trawlers, and the crew of the vessel were left in their boats. They refused to return, and the two armed trawlers stood by the vessel and eventually towed her to Falmouth. For these services the officers and crews of the trawlers claimed salvage remuneration from the owners of the Swedish vessel and her cargo, but the claim against the cargo was withdrawn. It was argued for the defendant shipowners that the plaintiffs were bound to salve a cargo of munitions for an allied Government as part of their public duty; that the saving of the ship was merely incidental to the saving of the cargo; that it was salvage from a war risk, namely, the risk of attack by enemy submarines, and not salvage from a marine risk; and that no salvage remuneration was recoverable:—

Held, that, assuming the plaintiffs were under a duty to salve the cargo, they were under no duty to the Swedish shipowners to

salve their vessel; that the saving was not only from submarine attack but from maritime perils also; and that, there being a salvage service, the whole risk to the salved vessel, war as well as marine risk, should be taken into account in estimating the value of the services.

ACTION OF SALVAGE.

The plaintiffs were the commanders, officers, and crews of His Majesty's steam trawlers *Fusilier* and *Kinaldie*, which were acting as armed patrol boats in the western part of the English Channel. The defendants were the owners of the Swedish steamship *Carrie* and her cargo, but the claim against the cargo was abandoned when it was ascertained that the cargo consisted of ammunition and other military stores consigned to the French Government.

The facts, which are fully stated in the judgment, shortly were that on the afternoon of January 1, 1917, the *Carrie*, a screw steamship of 892 tons gross, manned by a crew of sixteen hands and bound from Glasgow to Nantes with a cargo of shells, steel and iron plates, and other military stores, was stopped by a German submarine about twenty-three miles to the southward and eastward of the Wolf Rock, and the crew were ordered to get into their two boats. The weather was fine and there was a fresh north-westerly wind and some swell. Shortly afterwards two patrol boats, which proved to be the *Fusilier* and the *Kinaldie*, were sighted, and the submarine submerged and disappeared. The patrol boats came up and the crew of the *Carrie*, who feared that the submarine was not far away, refused to return to their vessel and got on board the *Kinaldie*. The two patrol boats then stood by the *Carrie* and dodged around her throughout the night. At daybreak the master of the *Carrie* was requested to rejoin his ship, but he refused to do so, and the officer in charge of the *Fusilier* then decided to tow the *Carrie* into port. Four men were put on board and the *Carrie* was taken in tow by the *Fusilier*, the *Kinaldie* remaining in attendance. After towing for some time the rope by which the *Fusilier* was fast to the *Carrie* parted, and the *Kinaldie* then made fast and towed the *Carrie* to Falmouth, which was reached about 5 P.M. The *Fusilier* accompanied as escort and made fast again outside Falmouth to assist in steering the *Carrie* into the harbour. The value of the *Carrie* was agreed at 39,000*l*.

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The plaintiffs alleged that by their services the *Carrie* was rescued from total loss, and that, but for the timely arrival of the two patrol vessels, she would either have been sunk by an enemy submarine or lost through perils of the seas.

The defendants denied that any salvage services were rendered to the *Carrie*, and alleged that, in rendering such services as they performed, the plaintiffs experienced no difficulty, incurred no added risk, and sustained no loss, damage, or injury of any kind. The *Carrie* was not rescued from any peril. Her own crew could and would have conducted her on her voyage without any assistance.

June 21, 22. *Bateson, K.C.*, and *D. Stephens*, for the plaintiffs. The *Carrie* was saved from imminent destruction. She was in great danger of being sunk by an enemy submarine and she had been abandoned by her crew. Both the standing-by and the towage to Falmouth constituted a salvage service of a nature which entitles the officers and crews of the patrol vessels to a substantial award. The fact that the services partly consisted in salving the *Carrie* from war perils does not disentitle the plaintiffs to salvage remuneration: see *The F. D. Lambert.* (1) There was no duty on the plaintiffs to protect neutral property. Their duty was to patrol and to look out for enemy submarines. They would have fulfilled their duty if they had merely reported the position of the *Currie* and had then continued their patrol work. Further, the four men who boarded the *Carrie* in a heavy sea ran considerable personal risk for which they are entitled to be rewarded: *The Francis and Eliza.* (2)

Laing, K.C., and *Dumas* (for *G. P. Langton*, serving in His Majesty's Forces), for the defendants. The plaintiffs are not entitled to salvage remuneration. It was just as much within the scope of their public duty to salve a cargo of munitions consigned to the French Government and in danger owing to the menace of German submarines as, e.g., protecting against piracy: *The Cargo ex Ulysses.* (3) It is the duty of officers and men of His Majesty's Navy to rescue vessels from other than maritime dangers: *The Francis and Eliza* (2); see also Kennedy's Civil Salvage, 2nd ed., pp. 112 and 113. In *The F. D. Lambert* (1), relied on by the

(1) See note (1), p. 232, post. (2) (1816) 2 Dods. 115.
(3) (1888) 13 P. D. 205.

plaintiffs, salvage was admitted, but on a value of 44,159*l.* the President only awarded the officers and crew of a torpedo-gunboat, 127 in number, the small sum of 350*l.*, and said that as regards protection from submarine attack patrol vessels were expected to render services of that kind as part of their duty. The plaintiffs' services consisted in saving the *Carrie* and her cargo from a war peril, and the salving from the perils of the seas was merely incidental to the war risk. The cargo could not have been salved without salving the ship also.

Stephens in reply. The case of *The Cargo ex Ulysses* (1) and other similar cases all relate to services rendered to British ships. There is no authority for the proposition that British warships must salve neutral property as part of their public duty. Assuming the plaintiffs owed a duty to salve the cargo, no claim is made in respect of that service.

Cur. adv. vult.

July 31. HILL J. read the following judgment:—This is a claim for salvage services rendered on January 1 and 2, 1917, by the commanders, officers, and crews of His Majesty's patrol boats *Fusilier* and *Kinaldie* to the Swedish steamship *Carrie*. There is no claim against her cargo, which was stated to have been consigned to the French Government, and nothing was said about any freight at risk.

The *Carrie* is a steamship of 892 tons gross, and carried a crew of sixteen hands. She was on a voyage from Glasgow to Nantes. Her value is 39,000*l.*

The *Fusilier* is an armed steam trawler of 276 tons gross, with engines of 510 horse-power indicated, and has a complement of seventeen hands. The *Kinaldie* is an armed steam trawler of 197 tons gross, with engines of 450 horse-power indicated, and a complement of thirteen hands all told. Both vessels were in the service of His Majesty, and therefore the services of the ships as instruments of salvage were gratuitous.

The only question is, what were the personal services of the plaintiffs, and were they salvage services, and, if they were, what is a proper award? Undoubtedly the trawlers saved the *Carrie*

(1) 13 P. D. 205.

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from a position of peril and brought her in safety into Falmouth, but the circumstances have to be considered.

Soon after 3 P.M. on January 1, 1917, the *Carrie* was stopped by a German submarine, her master and crew were ordered into the boats (two in number), and the submarine was preparing to sink the *Carrie* when it became alarmed or sighted some other prey. At any rate, it submerged and disappeared, leaving the *Carrie* with no one on board, and the crew of the *Carrie* in their boats, some half-mile away from their ship. Her position was about twenty miles south of the Wolf. The weather was fine, there was a fresh north-westerly wind, and there was considerable swell.

In these circumstances, between 4 and 5 P.M. the *Carrie* was sighted by the trawlers, and they came to her assistance. The plaintiffs say the submarine submerged on sighting the trawlers. The trawlers claim no merit in this. They had had a report of a submarine, and were searching for it when they sighted the *Carrie*. On coming up, the lieutenant in command told the master to return to the *Carrie*, and said that the trawlers would escort him to Ushant. The crew were unwilling, and the master refused to return. The *Kinaldie* took the crew out of the boats and throughout the night the two trawlers patrolled about the *Carrie*. So far there is no dispute.

As to what happened on the following morning, there is a complete contradiction of evidence. The evidence of the master and others of the *Carrie's* crew is that they asked to be allowed to return to the ship and continue their voyage, and that permission was refused. The evidence from the trawlers is that the master of the *Carrie* was asked and urged to return to his ship with his crew, and that he refused. Had the defendants' evidence been true, it would have reflected very greatly upon those in charge of the trawlers, but it is not true. Having heard and seen the witnesses and considered the documents, I have no hesitation at all in arriving at the conclusion that the master and crew of the *Carrie* absolutely refused to return to the ship. I do not blame them. They had been ordered by the enemy to quit the ship, they had a cargo on board which made them peculiarly liable to attack, and if the submarine again found them on board and on their way to France they would have got very short shrift. I am satisfied that these

considerations and their experiences of the day before had unnerved the master and made him only too glad to leave himself and the *Carrie* to the care of the trawlers.

The *Fusilier* then put out her boat and sent the second hand and three men on board the *Carrie*—in the swell, with no one on board the *Carrie*, it was naturally a work of some risk to get on board—and it was found that the fires had burnt out and there was no steam on the *Carrie's* engines. A hawser was passed and the *Fusilier* made fast. About 8 o'clock the *Fusilier* began to tow, with the *Kinaldie* accompanying as an escort. About 9 o'clock the hawser parted, and the *Kinaldie* made fast and began to tow about 9.45, with the *Fusilier* accompanying as escort. At 3.15, outside Falmouth, the *Fusilier* also made fast to assist to steer. At 5 o'clock the *Carrie* was brought to a safe anchorage in Falmouth harbour.

This was a very useful service. The *Carrie* was intact, but, without any one on board, she must have remained open to submarine attack, and at the mercy of any bad weather which might come on, and she would be unlit at night. It may be the crew would in time have plucked up courage to return, but in their then state of feeling it is much more likely they would have taken refuge on the first vessel which came up. No doubt some vessel would have come along in time, but whoever came up and assisted, he would have rendered a salvage service, and if the salvor had not been a King's ship the award would have been the greater.

As to the risk to the salvors, that was not very different from the risks which the officers and crews of armed trawlers are employed to encounter; there is, however, a substantial difference between the risk when towing or escorting a disabled ship at a necessarily slow speed and the risk when the trawler is on its proper patrol duties. There was also some risk in the boat work.

Such being the facts, the case would be a very simple one but for the contention of the defendants that the plaintiffs, being the commanders, officers, and crews of King's ships, are not entitled to any salvage as against the Swedish ship because it was carrying cargo for the French Government. The contention is that the plaintiffs were under a duty to save the property of an allied Government, and that the saving of the ship was a mere incident in the

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saving of the cargo. It is further said that the saving was not from maritime but from war perils.

I have already found that the crew refused to return to their ship. It is clear, therefore, that the saving was not only from attack by the enemy, but also from maritime perils. But for the assistance of the plaintiffs the *Carrie* would have been left in the open sea with no one on board. The plaintiffs brought her into port. No doubt the ship in being saved from maritime perils was also saved from enemy attack, but it was not saved only from enemy attack.

I have not here to consider whether the plaintiffs would have been entitled to salvage if the crew had returned to the *Carrie* and the plaintiffs had escorted her to Ushant. For such protection I understand the plaintiffs would have made no claim. What does arise for decision is whether the plaintiffs are entitled to salvage for saving the ship from maritime perils, and perhaps also, whether the Court ought to take into account the saving from war perils.

Now, the point argued, namely, that there was no salvage because the service was to French Government property, is not clearly raised by the defence, and while it was stated that the cargo was consigned to the French Government, it was not proved that it was the property of the French Government. Had the point been specially pleaded the plaintiffs would have been able to investigate the question of the property. But assuming that the cargo was the property of the French Government, and assuming also, as I think I must assume, that it is the duty of the officers and crews of King's ships to protect the property of allied Governments, I do not think that that makes the service qua the neutral ship any less a salvage service. As was said by Dr. Lushington in *The Iodine* (1), "I apprehend that where assistance is rendered by any vessel belonging to Her Majesty, the following principles are to be applied: that where a service is done, and there is personal risk and labour, Her Majesty's officers and seamen are entitled to be rewarded precisely in a similar manner, on the same principles, and in the same degree, as where any other persons render that service."

The foremost of those principles is that the salvors must be volunteers, and a salvor is not a volunteer when he is bound by

(1) (1844) 3 Notes of Cases, 140, 141.

his contractual or official duty to do that which he does. But duty here means duty to the owner of the salved property. As was said by Pickford L.J. in *The Sarpen* (1), "The test of voluntariness is only applicable as between the salvor and salved, and if the services be voluntary in relation to the salved, i.e., not rendered by reason of any obligation towards him, it is quite immaterial that the salvor has been ordered by some one who has control of his movements to render them."

I think the principle underlying this decision involves this further, that if the services be voluntary in relation to part of the salved property, i.e., not rendered by reason of any obligation to the owner of it, it is quite immaterial that the salvor is under a duty to some one else to render service to another part of the salved property.

Assuming, therefore, that the plaintiffs were under a duty to the cargo, I think that does not prevent their being salvors of the ship. They have, in fact, saved the ship for the Swedish owners. Whatever was their duty to their own country or to France, they were under no duty to the Swedish owners to save the Swedish ship. They are therefore entitled to claim as salvors in respect of the ship, and I have not to consider whether they are entitled to claim as salvors in respect of the cargo.

The saving of the Swedish ship being by the plaintiffs a salvage service, I see no reason in principle why the whole risks of the salved property, war risks as well as maritime, are not to be taken into account in estimating the value of the services to the salved property. In this case I shall take the whole risks into account. At the same time no salvage by a King's ship can be treated on the same footing as a salvage by a private ship. To begin with, nothing can be claimed (except in cases affected by the Merchant Shipping (Salvage) Act of 1916) for the services of the ship as the instrument of salvage. Further, the officers and crew can claim only with the sanction of the Admiralty, a sanction which is intended to enforce the rule laid down by Sir John Nicoll in *The Rapid* (2) and Dr. Lushington in *The Iodine* (3), that to entitle His Majesty's ships to claim salvage remuneration the services must be of an important character.

(1) [1916] P. 306, 315. (2) (1838) 3 Hagg. Adm. 419, 421.
(3) 3 Notes of Cases, 140, 141.

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Further, it must be remembered that the officers and crew "lose no time and run no risk of property—both are at the expense of the public": see *The Rapid* (1), and—as emphasized by the President in *The Gorliz* (2) and *The F. D. Lambert* (3), that the work done in connection with the salvage service may be no harder and no more risky than work in which they would be ordinarily engaged.

I apply all these considerations in the present case, and desire to repeat what I said in *The Athamas* (4), namely, that where more than one King's ship is engaged the service must be regarded as a whole without drawing too nice distinctions between the work of one and another, provided always that no crew must be rewarded unless its contribution was substantial.

The award which I think ought to be made in this case is an award of 750*l*. If it is desired that I should apportion that sum, then I give 375*l*. to the officers and crews of each of the plaintiffs' ships.

Solicitors for plaintiffs: *Thomas Cooper & Co., for Reginald Rogers & Son, Falmouth.*

Solicitors for defendants: *Botterell & Roche.*

NOTE (1).—THE F. D. LAMBERT.—In this case the commander, officers, and crew of His Majesty's torpedo-gunboat *Dryad*, 127 all told, claimed salvage remuneration for services rendered on April 26, 1916, to the steamship *F. D. Lambert*, her cargo and freight. The plaintiffs had the consent of the Lords Commissioners of the Admiralty to bring the action. The *F. D. Lambert*, a steamship of 2195 tons gross register, of the port of Sunderland, bound from Almeria to West Hartlepool with a cargo of iron ore, was at anchor off Lowestoft. She was preparing to get under way when a number of German warships came in sight and started shelling the coast. One of the shells struck the *F. D. Lambert*, setting her on fire aft, and for the safety of their lives the master and crew took to their boats and started to row towards the Corton light-vessel. As the boats were proceeding, the German warships, which by this time had been engaged by a British squadron of light cruisers and destroyers, disappeared in the haze. Shortly afterwards the *Dryad* came up, took the crew of the *F. D. Lambert* on board, and sent two officers and thirteen men to extinguish the fire and navigate the *F. D. Lambert* to a safe anchorage in Yarmouth roads. The master

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(1) 3 Hagg. Adm. 419, 421.

(2) See note (2), p. 233, post.

(3) See note (1).

(4) (1917) *Lloyd's List*, March 6.

and crew returned to their vessel when she had brought to an anchorage off Yarmouth pier.

The plaintiffs alleged that the *F. D. Lambert* had been abandoned by her crew, that she was badly on fire, and in imminent risk of total destruction by enemy submarines.

The defendants admitted that salvage services were rendered, but they denied that the vessel had been abandoned, and alleged that the master and crew intended to return to her and would have done so if their boats had been available or if they had been taken back by the *Dryad's* boat. The value of the *F. D. Lambert*, her cargo and freight, was 44,159*l.*

1917. May 9. THE PRESIDENT, in awarding the plaintiffs 350*l.*, said that whatever risk there was in returning to the *F. D. Lambert* of a continuance or recommencement of the shell fire was just as much a risk to the more valuable expert men sent from the *Dryad* as it would have been to the mixed crew of the *F. D. Lambert*. He did not think the master intended to abandon his vessel entirely; he was waiting to see what would occur, and when, some hours afterwards, the fire had expended itself, he would have gone back and done what he could to proceed with her on the voyage. His Lordship added: "It is said that there was danger from submarines. Unfortunately there was this danger; but it must be remembered that the protection by one of His Majesty's ships of a merchant vessel against submarines does not necessarily partake of a salvage nature. Patrol vessels round our coasts are expected to and do render services of that kind as part of their duties. But for such services our mercantile marine would fare very much worse than it does; and although I do not say that in no case is the protection of a ship from submarine danger to be taken into account when salvage services are rendered, yet in a case where there is no sea danger at all the Court must be very careful indeed not to lay it down that whenever such protection is afforded by one of His Majesty's ships the services thus rendered are to be rewarded by salvage remuneration."

NOTE (2).—THE GORLIZ.—July 4, 1917. In this case the officers and crews of His Majesty's hoppers *Outpost* and *Watcher* and of His Majesty's trawlers *Croupier* and *Lynx II.* claimed salvage remuneration for their assistance in towing the Spanish steamship *Gorliz*, 1805 tons gross, off the Sunk Sand, where she had grounded on June 4, 1916, in the course of a voyage from Bilbao to Jarrow with a cargo of iron ore. A claim by the owners, master, and crew of the tug *Goole No.* 7 for services rendered on the same occasion had been settled. The value of the *Gorliz*, her cargo and freight, was 58,000*l.* The *Watcher* and *Outpost* were engaged for three days each, the *Croupier* for two days, and the *Lynx II.* for one day.

The defendants admitted that the plaintiffs rendered salvage services, but alleged that they were extremely simple and rendered without risk.

THE PRESIDENT in awarding the officers and crew of the *Watcher* 75*l.*, of the *Outpost* 75*l.*, of the *Croupier* 40*l.*, and of the *Lynx II.* 20*l.*

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(210*l.* in all), said: "I want to make this observation: Although I am willing and anxious to remunerate generously the officers and crews of ships belonging to His Majesty where they take special personal risks and are allowed to claim by the Admiralty, or where, by their great efforts or skill, they contribute largely to the salving of property, I do not think that claims are to be encouraged where the services merely consist in using the vessels in which the claimants are engaged, without any personal risk and without the necessity for displaying any special skill or the rendering of any great or courageous service—where, in other words, the work done in connection with the salvage services by the officers and crews of these ships is no harder and involves no more risk than the work in which they would ordinarily be engaged." His Lordship added: "In the circumstances of this case the amount awarded must be small. There was no special risk and the plaintiffs were doing their ordinary work. If they had not been engaged in rendering these services they would have been doing different work, equally hard, elsewhere."

E. C. T.

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PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(IN PRIZE.)

THE AXEL JOHNSON; THE DROTTNING SOPHIA.

[1916, Nos. 1082 and 1154.]

Prize Court—Contraband—Wool to be combed in Enemy Country—Combed Wool to be returned to Neutral Country—Doctrine of the Prize Court.

A number of bales of wool (absolute contraband) consigned to the order of the claimants, a neutral firm in Sweden, were seized as prize on the ground that the wool was destined for Germany. It was argued for the claimants that even if any portion of the wool had an enemy destination (which they denied), it was only going to Germany to be treated, and was to be returned to Sweden as combed or spun wool, and was therefore not liable to condemnation, notwithstanding that the waste wool with its by-products would be retained by the German spinners. The evidence established that the whole of the wool was destined for Germany:—

Held, that if absolute contraband is captured on its way to enemy territory, a Court of Prize will not inquire as to what may ultimately become of it, and that the wool was subject to condemnation.

APPLICATION by the Procurator-General on behalf of the Crown for the condemnation of 179 bales of wool as absolute contraband destined for Germany.

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The facts, which are fully stated in the judgment, shortly were as follows :—The bales were laden on two neutral (Swedish) vessels, the *Axel Johnson* and the *Drottning Sophia*, by one Edward Blombergh at Buenos Aires, under bills of lading dated respectively March 15 and April 2, 1916, for delivery at Gothenburg to the order of the claimants, the Aktiebolaget Skanska Yllefabriken of Christianstad. The invoices and bills of lading were sent in the first place to Staudt & Co. and Hardt & Co., two Berlin firms from which the claimants alleged that they had purchased and paid for the goods in November, 1915, and of which they had become the owners before shipment. The bales of wool on the *Axel Johnson* were seized at Kirkwall on May 2, 1916, and those on the *Drottning Sophia*, also at Kirkwall, on June 14.

The claimants' case was that even if any of the wool had an enemy destination (which they denied), it was only going to Germany to be treated, and was to be returned to Sweden as combed or spun wool. It was admitted, however, that on this assumption the waste wool with its by-products would be retained by the German spinners.

June 21, 22. *Sir Frederick Smith, A.-G., Sir Gordon Hewart, S.-G.*, and *T. Mathew*, for the Procurator-General. On the facts it cannot be seriously disputed that the wool had an enemy destination ; it is clear also that at all material times it was enemy property ; the ostensible shipper, Blombergh, was only a dummy put forward by the Berlin sellers. The mere sending of the wool to Germany, even if only to be combed, is sufficient to justify condemnation. Further, the by-products would be an appreciable contribution to the military and economic strength of Germany. They form an actual part of the contraband goods, and the fact that they would have been retained in Germany affords additional ground for condemning the whole ; for if any portion of the goods have an enemy destination the whole are subject to condemnation under the doctrine of infection : *The Kronprinsessan Margareta* (1) ; see also *The Kim.* (2) Further, it is obvious that once Germany got the wool, of which she was in urgent need, she could return it or not as she chose, and a Court of Prize could not go into the question of the possibilities or probabili-

(1) Ante, p. 114. (2) [1915] P. 215, 286.

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ties of contraband goods ultimately being returned from the enemy country.

Sir Erle Richards, *K.C.*, and *Le Quesne*, for the claimants. The property passed to the claimants before shipment. Although at the outset, when the claimants purchased the wool, they contemplated the possibility of its going to Germany to be combed, circumstances altered, and combing machines were set up in Sweden. There was no need therefore, and no intention, to send the wool to Germany at all, and in fact, the claimants had not entered into any agreements to do so. But in any event, even assuming an enemy destination for the purposes of combing, the wool would have been returned to Sweden. The retention by the spinners of the by-products—a very small percentage of the whole –as part payment for the cost of the combing cannot affect the whole consignment; if the whole of the payment had been in cash the question could not have arisen at all. It is a serious extension of the doctrine of contraband if a whole cargo is subject to condemnation because, notwithstanding that its ultimate destination was neutral, some by-product of a contraband character may be obtained from it and retained in the enemy country. To condemn these goods the Crown must show that the whole object of the transaction was to send the by-products to Germany for Germany to have the benefit of them. The Crown has failed to prove this. The facts show that the object of sending the wool to Germany—assuming it or any part of it would have gone there—was merely to get it combed.

T. Mathew in reply. Under art. 30 of the Declaration of London absolute contraband is liable to capture if it is shown to be destined to territory belonging to the enemy; and by art. 31 proof of that destination is complete even if the vessel merely touches at an enemy port before reaching the neutral port for which the goods are documented. Art. 31 correctly states the international law on this point. This is an analogous case; the goods were to go to Germany before reaching their final destination, and that is sufficient to condemn them.

Cur. adv. vult.

July 23. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—This case raises a question of some importance as to the

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law applicable to contraband articles belonging to neutrals which were on the way to an enemy country to be treated or manufactured.

Seventy-five bales of wool laden on the *Axel Johnson* were seized on May 2, 1916. Two lots of 75 and 29 bales laden on the *Drottning Sophia* were seized on June 14, 1916. Wool was declared absolute contraband by Proclamation on March 11, 1915. The Aktiebolaget Skanska Yllefabriken claim the 179 bales.

The 75 bales on the *Axel Johnson* and the lot of 75 on the *Drottning Sophia* are alleged to have been bought by them from Staudt & Co., of Berlin, and the 29 bales on the *Drottning Sophia* from Hardt & Co., of Berlin. They say they had paid for the goods and were the owners when seizure was effected. The bill of lading for the *Axel Johnson* shipment was dated March 15, 1916. The shipper was stated to be "Mr. Edward Blombergh, of Buenos Aires." Delivery was to be at Gothenburg to the order of the Aktiebolaget Skanska Yllefabriken, of Christianstad. The bill of lading for the *Drottning Sophia* shipment was dated April 2, 1916. The shipper was stated to be Edward Blombergh. The delivery and consignees were the same. The invoices and bills of lading were sent in the first place to Staudt & Co. and Hardt & Co. respectively. When some of them reached the claimants is not certainly ascertained. Only one of the *Drottning Sophia* bills of lading for the 29 bales was received by the claimants, and that only some days before September 1, 1916, long after seizure. The circumstance is set out in an affidavit sworn by Mr. Engberg, the manager of the claimant company, of that date thus:—Paragraph 10: "The claimants had made several inquiries in order to get the bills of lading, but without any result. Some days ago one of the bills of lading came to hand in a usual envelope without any letter or other notification as to the sender. I suspect that the other copies of the bill of lading have been lost, or kept by somebody in the transit from America." In this latter case also it appears that the marine and war insurances were to be covered by Hardt & Co. Moreover, in both cases, the goods were shipped by enemy firms, and the claimants had no possession before seizure, and such title as they had was a paper title.

But the main question argued was whether, assuming that the claimants were owners of the wool, it was subject to seizure and confiscation as contraband. I propose to deal with the case on that

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basis, adopting the same assumption as to ownership, without deciding it.

The right to seize the wool and the power to condemn it depend upon its destination. The foundation of the doctrine of absolute contraband is the right accorded by international law to a belligerent to prevent contraband articles from reaching the enemy, and so to deprive him of the opportunity of using them for the purposes of war.

The succinct statement in art. 30 of the Declaration of London is, in my opinion, an accurate statement of the law of nations upon the question, and I adopt it, and the comment of M. Renault upon it, accordingly.

The article reads thus: "Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transhipment or a subsequent transport by land." M. Renault's comment upon it is: "The articles included in the list in art. 22 are absolute contraband when they are destined for territory belonging to or occupied by the enemy, or for his armed military or naval forces. These articles are liable to capture as soon as a final destination of this kind can be shown by the captor to exist. It is not, therefore, the destination of the vessel which is decisive, but that of the goods. It makes no difference if these goods are on board a vessel which is to discharge them in a neutral port; as soon as the captor is able to show that they are to be forwarded from there by land or sea to an enemy country, it is enough to justify the capture and subsequent condemnation of the cargo. The very principle of continuous voyage, as regards absolute contraband, is established by art. 30. The journey made by the goods is regarded as a whole." (1)

In order to arrive at a proper conclusion as to the destination of the wool in this case regard must be had to certain facts emerging from the evidence, which have a close bearing upon the matter.

The wool had to be combed before it could be used in the claimants' factory. No facilities existed in Sweden before the war for combing

(1) See General Report presented to the International Naval Conference, on behalf of its Drafting Committee (Parliamentary Paper, "Miscellaneous No. 4 (1909)," p. 47).

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wool. Sweden had imported wool already combed from this country and from Germany. After the war arrangements were made between Swedish manufacturers and German and Austrian spinners for the combing, which were known in the Swedish wool trade as the "Exchange Policy." The plan was to import raw uncombed wool from South America and forward it to German and Austrian spinners to be combed or spun; and to allow a proportion of the wool (from 30 per cent. to 40 per cent. of the amount combed) and all the by-products of the combing operations, namely, the short wool or "noils," and wastes, and animal fats, to be retained by the spinners. These by-products and fats, as well as the wool, were of importance, and in great demand in Germany for purposes immediately connected with the war and with the manufacture of explosives. Engberg himself said in one of his affidavits that the combing always takes away a good deal of the wool in the form of waste, and he therefore required a bigger quantity, and ordered 150 bales instead of 100 accordingly.

In negotiating for the purchase from Staudt & Co. one of the terms of the arrangement was that "The yield is to be valued for combing."

On September 21, Staudt & Co. wrote to the claimants a letter which must be set out in full:—

"September 21, 1915.

"(Confidential.)

"Aktiebolaget Skanska Yllefabriken, Christianstad.

"Confirming our letter of 11th inst. Mr. Scheuermann, based on his conversation with your director, Mr. Engberg, communicated with the head office for export permits of woollen yarns, and we are able to inform you in that connection—of course without engagement on our part—that for the present the question of one-third of the wool sent to Germany by Swedish manufacturers for combing or spinning purposes being left by them in Germany is to be waived.

"It is, on the contrary intended to return to the Swedish firms passing orders, the whole sliver or the whole quantity of yarn that was obtained from the parcel of wool in question, and only the waste wool, residues and throw-outs would have to be left in Germany, against adequate payment. In view of the German Government holding out the prospect of such far-reaching obligingness, it must surely be a matter of greatest interest to every Swedish manufacturer

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to import as much as possible from La Plata, and we would ask you to consider the question of perhaps ordering a certain quantity of your other qualities also. As soon as the wool which you import shall have reached Sweden, you will be so good as to apply to us, and we shall then enter into communication with the head office for export permits for the purpose of arranging everything in your interest. We were glad to note that, if necessary, you are prepared to give us your assistance respecting the importation for our own account to Sweden, and shall take the liberty of approaching you again later on on this subject. Of course this matter must be handled in a strictly confidential manner.

"Yours, etc.,

"Per Staudt & Co.

"(Sgd.) Scheuermann.

"(Sgd.) G. Bam."

The translation supplied by the claimants renders the first paragraph as follows:—"We hereby confirm our letter of the 11th inst. Your manager Mr. Engberg and our Mr. Scheuermann have had a conference with the Commission for export of the wool and we beg to inform you without responsibility from our side, that the Swedish manufacturers who send their wool to Germany for combing and spinning must leave one-third of the parcel in Germany." But I doubt whether that is as accurate as the Crown's version. In any event I give the claimants the benefit of the Crown's translation, which is more favourable to them.

Later the claimants requested Staudt & Co. "not to indicate in any way whatever, either in the invoices or in any other papers in this connection," that the wool was intended for combing purposes, "in order to avoid drawing the special attention of the English to the lots." To this request Staudt & Co. assented with prompt willingness. In fact they had even forestalled the request, for they said "What you mention respecting the drawing up of the invoices had *already* received our attention, and our people will of course say nothing in the documents about the wool being destined for combing purposes." Earlier than this Staudt & Co. gave general directions to their Buenos Aires branch to "put on all European bills of lading neither the name of the firm nor of the owner but of a neutral."

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It was at first intended by Staudt & Co., apparently, that the wool should be shipped in the name of "Simon Hermanos." Later, one Edward Blombergh, of Gothenburg, was out in Buenos Aires; and the claimants directed Staudt & Co. to transfer and deliver the wool to him, as if he had been a purchaser, and said that he would act as shipper and the Swedish Government as consignees. This was done in view of the difficulties which it was said the English were placing on the Swedish import trade. Similar directions were given to Hardt & Co. in reference to their *Drottning Sophia* shipment. Blombergh adopted the role of shipper in both cases as if he was a merchant at Buenos Aires; but the Swedish Government were not named as consignees. He probably shrank from using the name of the Government by the mere direction of the claimants. He has not taken the opportunity of giving any evidence in explanation.

In this way the goods were afloat consigned to the claimants at Gothenburg, not in transit to Christianstad, where the claimants' business was, nor to Norrkoping for combing. Gothenburg was more convenient for transhipment to Germany than for transhipment or transmission overland to Christianstad or Norrkoping.

An attempt was made by Engberg in his first affidavit to show that the goods were intended to be combed in Sweden. He deposed that "the combing of the wool in question should take place in beforehand (*sic*) at Forenade Yllefabrikerna in Norrkoping." This was a disingenuous statement, as the whole of his conduct and the facts show. In order to give an air of truth to it he referred to an alleged agreement, evidenced by copies of two letters of the middle of May, 1916, after the seizure. The originals were not produced. In any event the agreement only purported to provide for combing, subject to certain conditions, of a quantity up to 600 to 1000 kilos. per week, and a total up to 12,000 kilos.; but "the combing was to take place within a month after information, but not before August 1, 1916." It will be noted that the shipments in these two vessels alone exceeded 80,000 kilos. The aforesaid statement by Engberg in his affidavit did not derive any substantial strength from this attempt to support it.

Having regard to the facts established by the evidence, I cannot entertain any doubt about the destination of the wool. I find it was shipped to Gothenburg for the purpose of being forwarded directly

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to Germany. This, in my view, is enough to dispose of the case, and to justify the condemnation of the wool as absolute contraband destined for enemy territory.

But it was contended that even in this event the wool was not subject to condemnation, because it was intended to be sent back to Sweden as combed or spun wool, notwithstanding that parts of it —waste wool, with its by-products and fats—were to be retained in the enemy country. I cannot accept that contention. If absolute contraband is once traced and captured on its way to enemy territory a Court of Prize will not embark upon inquiries as to what will, or, to speak more strictly, what may, ultimately become of it. Such an inquiry would be a dangerous fetter to fasten upon belligerent captors. Captors know how to act when they find goods useful for the enemy in war on their way to the enemy country; but they would be unduly puzzled and hampered in their action if they had further to consider what the future history of a dealing with the goods might be. After contraband articles reached German territory in the guise, or even character, of neutral goods, the neutral owners themselves might by the allurement of high prices, or the prompting of political sympathies, be persuaded to dispose of the goods to the enemy. Apart from this, who could with any feeling of certainty predict, with reference to the wool in question, that the German Government would not retain a substantial portion of it as part consideration for the combing, or indeed requisition, or retain the whole of the wool on terms to be either imposed or arranged? Moreover, parts of it which would necessarily be left behind would be of substantial use in the war; and this Court would not and ought not, in my opinion, to make any distinction between the various parts.

I will add that the claimants, upon the undisputed facts, pretended, and falsely pretended, that the wool had been transferred and delivered to Blombergh before shipment, and that he was an independent shipper, and not the German vendors. Following upon this project the bills of lading were falsely made out. And this was done with the avowed object of evading search and capture. I need not again refer to authorities which I have cited in other cases for the proposition that false papers made out for the purpose of deceiving possible captors will invalidate a claim. It

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is like *The Sarah Christina* (1), *The Eenrom* (2), *The Amiable Isabella* (3), and the other cases which I have cited in *The Sorfareren.* (4)

I will only quote a couple of passages from Mr. Dana's edition of Wheaton's International Law, pp. 663 and 664, which are in point, and to which, so far as I remember, I have not previously called attention. "By the present practice of nations, if he (a neutral) . . . . . makes use of fraudulent devices to mislead the belligerent, and defeat or impair the right of search, he is liable to condemnation for unneutral acts in aid of the enemy . . . . Producers and merchants can continue their business and procure transportation without criminality, taking the risk of the capture and condemnation of noxious articles. At the same time, the belligerents have the further security of being able to condemn all the interests involved, whether vessel or cargo, if there have been fraudulent practices, or hostile service."

For the reasons given I pronounce an order that all the goods claimed be condemned as good and lawful prize.

Solicitor for Procurator-General: *The Treasury Solicitor.*
Solicitors for claimants: *Botterell & Roche.*

(1) (1799) 1 C. Rob. 237; 1 Eng. P. C. 125.
(2) (1799) 2 C. Rob. 1, 8; 1 Eng. P. C. 168.
(3) (1821) 6 Wheat. 1, 78.
(4) (1915) 1 Br. & Col. P. C. 589.

E. C. T.

1917
July 6.

[DIVISIONAL COURT.]

BUTLER *v.* BUTLER.

Divorce—Desertion—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39)—*Good Cause for Separation.*

The innocent contraction of a venereal disease by a wife before marriage, though communicated to her husband, does not afford the husband sufficient ground for leaving his wife, and, therefore, is no defence to her complaint to a Court of summary jurisdiction for maintenance on the ground of desertion.

THIS was an appeal of Mrs. Butler against the dismissal by two justices of Portsmouth of her information and complaint under the Summary Jurisdiction (Married Women) Act, 1895, for maintenance on the ground of her husband's desertion.

The desertion was proved, but it appeared from the evidence that three days after the marriage the complainant found that she had a sore on her lip which the doctor found to be syphilitic. The doctor said in the husband's presence that it was probably caused by her having kissed an infected person or drunk out of a dirty vessel. The husband consented to her undergoing treatment for a week, and then cohabited with her for three weeks. After this he left her and refused to live with her again. The husband had contracted the disease and asserted that his wife had communicated it to him.

The wife's evidence was that she had never done anything wrong, and the husband expressly negatived any suggestion that she knew at the time of her marriage what she was suffering from. The husband had made his wife an allowance until one month before the summons, but had then ceased to make any contribution to her maintenance.

The justices dismissed the complaint, giving as their reason that they were satisfied from the evidence that the defendant had a good cause for refusing to cohabit with the complainant, as she was suffering from venereal disease contracted before the marriage and which she had communicated to defendant.

The complainant appealed on the grounds (1.) that the decision

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was bad in law on the face of it; (2.) that it was against the evidence as there was clear evidence of desertion.

C. G. Talbot-Ponsonby, for the appellant. It is clear from the evidence that the disease from which the appellant suffered was innocently contracted, and, therefore, it afforded the husband no just cause for leaving her.

The respondent did not appear.

HORRIDGE J. In this case the only reason given by the justices for refusing to find desertion was that the husband had good cause for refusing to cohabit on the ground of the venereal disease from which the wife suffered and which was innocently contracted before the marriage. After marriage there was a sore upon the complainant's lip which the doctor thought arose from kissing an infected person or drinking from a dirty vessel. Therefore the question is whether her innocently suffering from a disease of this nature afforded the husband any justification for separating. In our view it did not. We say nothing as to what our decision would be if the disease were guiltily contracted. And the question whether such a state of things as the present would furnish a defence to a petition for restitution of conjugal rights must be dealt with when it arises.

The case must be remitted to the justices to deal with the complaint of desertion. Our order will contain the following recital: "This Court being of opinion that the reason stated by the justices was not a good cause for refusing to cohabit."

HILL J. I agree.

Solicitors: *Tapp, Blackmore & Weston, for G. H. King & Franckeiss, Portsmouth.*

J. R. B.

1917
July 9.

IN THE ESTATE OF MAJOR L. S. TOLLEMACHE, DECEASED.

Soldier's Will—Appointment of Guardians of Infant Son—Sufficient disposition of Personal Estate to make a Soldier's Will within Wills Act, 1837 (1 *Vict. c.* 26), *s.* 11.

A guardian of a child can be appointed by a will only if the will satisfies the provisions of the Act 12 Car. 2, c. 24, s. 8, and therefore cannot be appointed by a soldier's will within the Wills Act, 1837 (1 Vict. c. 26), s. 11. Neither that Act nor the Statute of Frauds (29 Car. 2, c. 3), s. 23, gives power to appoint a guardian by a soldier's will. A direction to a trustee under an existing will to deal with personal estate, by paying the income to a person for the benefit of an infant, is a valid disposition of personal estate within s. 11 of the Wills Act, 1837.

MAJOR L. S. TOLLEMACHE, of the Leicestershire Regiment, was killed in battle on February 20, 1917; his regiment had been mobilized at the commencement of the war, and he had been on active service from that time till his death. He had been married on April 23, 1914, to Kathleen Mary Mills; a son was born on January 23, 1915, and his wife died on March 4, 1915.

Major Tollemache made a will in the usual form on March 12, 1915, whereby he appointed George Henry Mills to be sole executor and trustee of his will, and appointed Charlotte Dorothea Mills and Alice Maud Williams, the mother and sister of his wife, during their joint lives and the survivor of them during her life to be the guardians of his infant son until he should attain the age of twenty-one years; but in case they should both die before that event he appointed his sisters, Mabel Bryant and Lyonesse Astley Cooper, or the survivor of them, to be such guardians or guardian; and he gave all his real and personal estate to his trustee upon trust for sale and conversion, and, after payment of his debts, funeral and testamentary expenses, to invest the residue and to apply the income thereof for the maintenance, education, or benefit of his said son up to the age of twenty-eight years, with a power of advancement up to half the capital, the surplus income to form part of his residuary estate, and, subject thereto, to hold the capital and income of the trust fund upon trust for his said son absolutely upon his attaining the age of twenty-eight years.

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Together with the will the testator handed to the solicitor who prepared it a memorandum expressing his wishes about his son's education which he had written out on March 7, 1915.

On December 8, 1916, while on active service, the testator wrote a memorandum stating that he wished his son to be handed over to the charge of his sister, Mrs. L. A. Cooper, and requested that his son's trustee should hand over periodically (up to his son's total income) whatever was required by his said sister for his son's maintenance and education.

On February 3, 1917, while on active service, he wrote and signed the following memorandum: "In case anything should happen to me (either resulting in death or total incapacity) I wish my son Denys to be put in charge of my second sister, Mrs. L. A. Cooper, or, in case of her death, my youngest sister, Mrs. A. P. Oppé. This cancels my previous instructions handed to Mr. Mackay. I wish the trustee to give up to full amount of total yearly income to either of above-mentioned who may have charge of my son until such time as he comes of age; this to enable them to carry out their (which will be mine) wishes without reference. Both these sisters thoroughly understand how I wish my son to be brought up and I wish them to be given every help that the trustee can give. Signed—L. S. Tollemache."

This was a motion by the executor appointed by the will for directions as to which documents constituted the will of the deceased.

Hughes, K.C., and *W. O. Willis*, for the executor. The only ground on which any of the three documents other than the will, which was regularly attested, could be admitted to probate would be that they were soldiers' wills within s. 23 of the Statute of Frauds (29 Car. 2, c. 3) and s. 11 of the Wills Act, 1837 (1 Vict. c. 26). Both these sections are in the same form, and merely provide that any soldier being in actual military service may dispose of his personal estate as he might have done before the making of the Act. None of these three documents dispose of any personal estate. The document of February 3, 1917, which was nearest to being such a disposition, does not really dispose of any personal estate; it only expresses a wish that personal estate already

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disposed of by a will in regular form may be applied in a particular way.

The appointment of a guardian is certainly not a disposition of personal estate. And such an appointment cannot be made by a soldier's will, for until the passing of 12 Car. 2, c. 24, s. 8, there was no power for a father to appoint a guardian of his children by will, and that statute requires that such a testamentary appointment should have two witnesses. It is settled law that a will which merely appoints a testamentary guardian cannot be admitted to probate: *In the Goods of Morton* (1), following *Lady Chester's Case* (2), in which case the Court of King's Bench prohibited the Ecclesiastical Court from granting probate of such a will. It may be urged that the memorandum of February 3, 1917, though it may not be good as an appointment of new guardians, effects a revocation of the appointment in the will, but the case of *Ex parte Earl of Ilchester* (3) decided that an appointment of guardians can only be revoked by a will executed in the way required for an appointment. In the same case the judgment of Lord Alvanley C.J. contains a full statement of the history of appointment of guardians by will.

Cotes-Preedy, for the testator's sisters mentioned in the document of February 3, 1917. The document of February 3, 1917, is the only one of the three which I can contend should be admitted to probate with the will of March 12, 1915, as being a good soldier's will. It is admitted that all the testator's estate was personalty, and, therefore, the direction to the trustee to give up the whole yearly income to the sister who has charge of the infant is a disposition of personal estate, and as such it ought to be admitted to probate. The Court cannot admit part of a document to probate and exclude the rest. The expression of the testator's wish as to guardianship must therefore be admitted; and, though it may not amount to a valid appointment, the Chancery Division may have regard to the testator's wishes.

HORRIDGE J. The question before me is whether the document of February 3, 1917, should be admitted to probate. The first

(1) (1864) 3 Sw. & Tr. 422; 33 L. J. (P.) 87.

(2) (1671) 1 Vent. 207; 3 Keb. 30.

(3) (1803) 7 Ves. 348, 370.

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part of it is an expression of a wish of the deceased that his son should be placed in the charge of one of his sisters, and in case of her death in that of another. I do not think that is an appointment of a guardian at all. Such an appointment can only be made in the manner provided by s. 8 of the Act 12 Car. 2, c. 24. That is clearly established by the decision in *Ex parte Earl of Ilchester*. (1) It is clear that neither the Statute of Frauds nor the Wills Act expressly gives power to appoint a guardian by a soldier's will. It has been suggested that a power to appoint a guardian may be included under the word "rights" in the definition of personal estate contained in the first section of the Wills Act. But that point was not pressed, and I am clearly of opinion that there is no power to appoint a guardian by a soldier's will which is not in the form required by the statute of Charles II.

That still leaves the question whether the direction to the trustee to "give up the full amount of total yearly income to either of the above mentioned who may have charge of my son" is a disposition of personal estate. It is not my province to decide what the effect of that direction may be; but I think that it is a direction to the trustee to deal with the testator's personal estate in a particular way, and as such it ought to be admitted to probate. If any part of the document is admitted the whole must be, and I find that this document ought to be admitted to probate with the will of March 12, 1915. But I preface that finding by saying that in my opinion the document of February 3, 1917, is not a valid appointment of guardians nor a revocation of the appointment contained in the will. The other two documents will be excluded.

Solicitors: *Iliffe, Henley & Sweet; Julius Bertram.*

(1) 7 Ves. 348, 379.

J. R. B.

1917
June 28;
Oct. 18.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(In Prize.)

THE SIGURD.

Prize Court—Seizure of Cargo under Reprisals Order in Council of March 11, 1915*—Construction of art. IV.—Release of Cargo—Cargo Owners' Claim for Damages and Costs.*

Cargo belonging and consigned to the claimants, a firm carrying on business in Chile, was laden on board a neutral vessel at Hamburg before the outbreak of war. The vessel sailed after the outbreak of war. She had to put into a Norwegian port for repairs, where she remained until March 23, 1915. She then resumed her voyage to Chile. On April 5 she was stopped by a British patrol vessel and sent into a British port, where the cargo was ordered to be discharged under art. IV. of the Reprisals Order in Council of March 11, 1915, as being cargo of enemy origin laden on board a vessel which sailed from a port other than a German port after March 1, 1915.

The Court ordered the goods to be released on the ground tha the vessel must be dealt with by reference not to art. IV., but to art. II., of the Order, which provides that no vessel which sailed from a German port after March 1, 1915, shall be allowed to proceed on her voyage with any goods on board laden at such port; and that, as she sailed from a German port before March 1, she was immune from the obligation to discharge her cargo.

The cargo owners claimed damages and costs on the ground that the seizure and detention of their goods was unlawful:—

Held, that the claim must be disallowed. The legal question at issue was of importance and not easy to decide, and the obligation to pay damages and costs should not be imposed upon the Crown as a consequence of the mistaken construction placed upon the Order in Council.

The Luna (1810) Edw. 190 followed.

Under a bill of lading dated July 27, 1914, 1223 packages of goods of a miscellaneous description were shipped at Hamburg on board the Norwegian sailing ship *Sigurd*, consigned to the claimants, Weber & Co., at Concepcion, Chile. The *Sigurd* did not start on her voyage from Hamburg until October 21, 1914. She met with bad weather and sustained damage, and put in, on October 28, to Christiania. From there she was ordered to Stavanger, where she had repairs executed. The repairs occupied

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a considerable time, part of the cargo had to be discharged and reloaded, and the *Sigurd* did not leave Stavanger until March 23, 1915. In the course of her voyage she was stopped on April 5 by a British patrol boat and was sent to Stornoway. She was then ordered to Swansea, where the goods in question were ordered to be discharged under the Reprisals Order in Council of March 11, 1915.

The case for the Crown was that upon a strict reading of art. IV. of the Order in Council the *Sigurd* was a merchant vessel which sailed from a port other than a German port, namely Stavanger, after March 1, 1915, having on board goods of enemy origin. Art. IV. provides that "Every merchant vessel which sailed from a port other than a German port after March 1, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court and dealt with in such manner as the Court may in the circumstances deem just."

The case came before the Court on June 28, 1917. The learned PRESIDENT ordered that the goods should be released.

His Lordship said: "I think, in applying this Order, that its general effect must be regarded, and, for that purpose, that it is expedient also to look at the preamble to the Order. I do not think that it would be right to take one portion of the Order, like art. IV., and construe that as strictly as one would have to construe a section of an Act of Parliament. The object, and the legitimate object, of the Order was to prevent Germany trading with countries outside by preventing commodities of every kind from reaching or leaving Germany after March 1, 1915. The Order was made, as the preamble recites, by reason of the fact that 'The German Government has issued certain Orders which, in violation of the usages of war, purport to declare the waters surrounding the United Kingdom a military area, in which all British and allied merchant vessels will be destroyed irrespective of the safety of the lives of passengers and

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crew, and in which neutral shipping will be exposed to similar danger in view of the uncertainties of naval warfare.' It cannot be helped that the effect of the Order is in some cases not only to prevent German trade, but to inflict what might be considered by neutrals hardships upon neutral traders and upon neutral owners of ships. Germany has rendered the course which was adopted necessary, and those hardships must be suffered. Reading the Order as a whole, and remembering that the object of it is so to restrict the commerce of Germany after March 1, 1915, I have come to the conclusion that this vessel and the goods laden on board her must be dealt with by reference to the implied meaning of art. II. and not to the precise words of art. IV. I have dealt with this Order in previous cases. Arts. I. and III. of the Order deal with goods which are intended to be taken into Germany; arts. II. and IV. are intended to deal with goods coming from Germany, and art. II. says that 'No merchant vessel which sailed from any German port after March 1, 1915, shall be allowed to proceed on her voyage with any goods on board laden at such port.' That must imply that a merchant vessel which sailed from a German port before March 1 would be immune from the obligation to discharge the goods in a British or allied port within the meaning of the Order. Now, this vessel clearly sailed from a German port before March 1, 1915, with goods laden at such port. In that case the Court need not be troubled with any question about enemy origin; that, I understand, is determined by the fact that the goods are laden at a German port, and they are so regarded as being of enemy origin. Then art. IV. deals, or, I think, is intended to deal, with goods which were not laden in Germany, but which, being of German origin, or which were German property, were laden at another port. These goods do not, I think, fairly come within that description. They were goods laden at a German port before March 1, and the vessel left before March 1, 1915, and therefore, I think, under art. II. she was immune from the obligation of stopping for the discharge of the goods in a British or allied port. The result is that the goods must be released."

The claim of Weber & Co. for costs and damages for the alleged improper seizure and detention of their goods was reserved.

1917. Oct. 18. *MacKinnon, K.C.*, and *Balloch*, for the claimants. The cargo was seized under a mistaken construction of the Order in Council. To justify the seizure there must be reasonable ground for believing that the property seized will prove to be lawful prize. "If the capture is made without probable cause the captors are liable for damages, costs, and expenses to the claimants": Pratt's edition of Story, p. 39, quoted in the judgment of the Privy Council in *The Ostsee.* (1) *The Luna* (2), where expenses were awarded to the captors although the seizure was wrongful, should not be followed. In that case, which, like the present, turned on the construction of an Order in Council, the capture was at sea and the captor had to exercise his own judgment without any opportunity for deliberation on the meaning of the Order in Council. In the present case after the ship was brought in the cargo was discharged and seized by the officers of the Crown after due deliberation. The seizure was unlawful, and the captors are therefore entitled to damages and costs, including the costs of the legal proceedings. [*The Leucade* (3) was also referred to.]

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Sir Frederick Smith, A.-G., and *J. G. Pease*, for the Procurator-General. The claimants are not entitled to anything either by way of costs or damages. *The Luna* (2) is a direct authority in favour of the Crown, and that case had the approval of the Privy Council in *The Ostsee.* (1) Further, although carrying on business in Chile, the claimants must be treated as enemies, as owing to their hostile connections they were proclaimed an enemy firm under the Trading with the Enemy (Extension of Powers) Act, 1915, on May 2, 1916. It appears also from the claimants' own documents that the claim is made on the instructions and on behalf of Hamburg underwriters. The award of costs or damages, therefore, might involve a payment to the enemy, to whom the fruits of an action may not be remitted: see *M'Connell* v. *Hector* (4); see also *Brandon* v. *Nesbitt* (5) and the observations of Lord Halsbury in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (6)

(1) (1855) 9 Moo. P. C. 150, 160; 2 Eng. P. C. 432, 439.
(2) Edw. 190.
(3) (1855) Spinks, 217; 2 Eng. P. C. 473.
(4) (1802) 3 Bos. & P. 113.
(5) (1794) 6 T. R. 23.
(6) [1916] 2 A. C. 307, 316.

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THE PRESIDENT (SIR SAMUEL EVANS). On June 28, 1917, I decided the point of law arising out of the seizure under the Order in Council of March 11, 1915. I did so after considerable argument and decided the case simply upon certain assumed or agreed facts relating to the question whether the *Sigurd* had left Germany before or after the war. I ordered the goods to be released because, in my view, the Order in Council did not apply in such a case as this. The owners of part of the cargo, thus ordered to be released, now make a claim against the Crown for costs and damages, on the ground that the seizure was wrongful and was a seizure which entitled them, in accordance with the principles applicable in this Court, to costs and damages. I do not know the facts with regard to the claimants, or with regard to the property in the goods. Certain matters have been stated by the learned Attorney-General, which he says raise a suspicion that the goods may belong to the enemy, and that the result of giving costs and damages in this case would be to award costs and damages to that enemy. I say nothing upon that point, because I have not the materials before me to enable me to do so. I am assuming—and assuming merely for the purpose of deciding the question of law which has been argued to-day—that the claimants are properly before the Court, and that if costs and damages were to be allowed it is right that the claimants should recover them. But, so far as I am concerned, in any future proceedings it must not be said that I have decided the case upon any other ground than the assumed ground that the claimants are rightly before the Court, and are the persons entitled to be paid the costs and damages if my decision were in their favour.

The question which I have to decide is whether or not the seizure, in the circumstances in which it was made, was one which imposes an obligation upon the Crown to answer to the claimants, the owners of the goods, in costs and damages. The point which was argued on June 28, 1917, was an important one, and not at all an easy one to decide. It was fully argued, and I am told that my judgment is to be reviewed in the Privy Council. That means that the first Law Officers of the Crown and others think that the point is an arguable one, and very likely they have advised that my judgment is not right. I merely mention that to show that the point is one involving difficulties.

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Having said so much, I will only say that I will follow the case of *The Luna* (1), which was decided by Lord Stowell. That was a case where the capture was made under circumstances very similar to this, by reason of a wrong construction being placed upon an Order in Council of that day. Lord Stowell said that where there is a legal difficulty of that kind he would not impose upon the captors an obligation to pay any costs or damages. That case was referred to and dealt with, among other cases, in *The Ostsee* (2) by the Privy Council at the time of the Crimean War. The passage in the judgment of the Privy Council referring to *The Luna* (1) is as follows: "The question of expenses does not seem to have been argued, and Lord Stowell probably felt that he was going to the very verge of the law, for he says: 'I cannot in this instance refuse the captors their expenses, but in no future case arising on the same state of facts will the Court grant this indulgence.'" I do not presume to say what I think Lord Stowell "probably felt," but I see no indication at all in the judgment in *The Luna* (1) that Lord Stowell was "going to the very verge of the law." The Privy Council in *The Ostsee* (3), referring to that case and others with which they were dealing under the same head, said this: "If, however, these cases be held to establish the principle that there may be questions of so much nicety in the construction of public documents, or the determination of unsettled points of law, as to exonerate captors from what would ordinarily be the consequence of their mistake, they will not much assist the argument of the respondents here, where no questions of law of any kind appear to have existed." That passage shows that the case of *The Luna* (1) was not disapproved of by the Privy Council, and tends to show that the case was one of which they would have approved if they had found it necessary, in the facts of that case, to have given their approval.

I accept the case of *The Luna* (1) as an authority which I ought to follow. The result is that the claim for costs and damages is disallowed.

As to the costs of the legal proceedings, I have allowed that application to be made to-day which, properly of course, ought to have been made at the conclusion of the hearing in June last. It

(1) Edw. 190.

(2) 9 Moo. P. C. 150, 174; 2 Eng. P. C. 450.

(3) 9 Moo. P. C. 175.

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follows from my decision to-day that I ought not to give the claimants any costs at all.

Solicitor for the Procurator-General: *The Treasury Solicitor.*
Solicitors for claimants: *Stokes & Stokes.*

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April 26, 27, 30; *May* 1, 22.

GREGSON *v.* TAYLOR AND OTHERS.

[1916 G. 965.]

Probate—Will—Striking out Words—Knowledge and Approval—Will read over to competent Testator—Presumption of Knowledge and Approval—Evidence required to rebut Presumption.

Although since the decision of *Fulton* v. *Andrew* (1875) L. R. 7 H. L. 448 it can no longer be considered a binding rule of law that, in the absence of fraud or suspicion of fraud, the fact that a capable testator has read or had read over to him a will or codicil which he afterwards executes must be taken for the purposes of probate as absolute proof that he knew and approved all its contents, those circumstances afford a very strong presumption of his knowledge and approval. This presumption can be set aside only by the clearest evidence that some part of the document read over was not really part of his will.

THE deceased, a spinster, made a will dated October 27, 1913, and a codicil dated October 5, 1915. She died on October 7, 1915.

By the will she gave certain legacies in the event of her dying after Mrs. Philpot, therein described as her mother, which event happened. These included amongst others a legacy to Joan Mary Ashwin, the daughter of F. M. B. Ashwin, of 5000*l.*, and to Adelaide Maud Ashwin, the wife of F. M. B. Ashwin, a legacy of 5000*l.*, and she appointed the defendants, G. W. Taylor, F. M. B. Ashwin, and H. S. Knight Gregson, executors.

The testatrix was the adopted, not the natural, daughter of Mrs. Philpot.

The codicil contained among other bequests one of 4000*l.* to Joan Mary Ashwin, daughter of F. M. B. Ashwin, in place of 5000*l.* given by the will, and "To Maud Adelaide Ashwin (daughter of Francis Manley Bird Ashwin) the sum of 4000*l.* (four thousand

pounds)." The codicil increased some legacies given by the will, decreased others, and gave some entirely new legacies.

The will and codicil were proved in common form by all the executors named in the will.

This action was brought by the son of the executor H. S. Knight Gregson, who was one of the three residuary legatees and was an infant at the date of the writ, asking the Court to revoke the probate originally granted and pronounce for the will and codicil as constituting the last will of the testatrix, omitting from the codicil the words " To Maud Adelaide Ashwin (daughter of Francis Manley Bird Ashwin) the sum of 4000*l.* (four thousand pounds)."

The plaintiff alleged that these words were introduced into the codicil by mistake and without the knowledge and approval of the testatrix; that she had given no instructions for the bequest, that it was not read over by her, and if it was read over to her it was not properly explained, and she was too weak and ill to detect without explanation that the said bequest had been introduced into the codicil; and that when she executed the codicil she was not aware of the insertion of the said bequest or of its effect.

Taylor and Ashwin, two of the executors, put in a defence denying that there was any mistake, but at the hearing expressed their desire only to put all material facts before the Court and not to press any particular view on the matters in question.

Gregson, the third executor, put in a separate defence, saying that when he joined in taking probate in common form he was not aware of all the circumstances in connection with the preparation and execution of the codicil; but he also submitted the matter to the judgment of the Court.

The last defendant was Mrs. Adelaide Maud Ashwin, the wife of F. M. B. Ashwin. By her defence she claimed to be the person described in the codicil as Maud Adelaide Ashwin, and alleged that there was no mistake except in the description, and asked the Court to pronounce for the will and codicil, leaving out only the words " daughter of Francis Manley Bird Ashwin."

At the hearing Mrs. Ashwin's counsel argued that the Court ought not to omit any words, but if anything were omitted it ought to be only the description as daughter of F. M. B. Ashwin.

The circumstances under which the codicil was executed were

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as follows: The testatrix had suffered a long time from cancer, and on October 2, 1915, she became suddenly worse, and wrote to her solicitor, Mr. Taylor, a member of the firm of Messrs. Morley, Shirreff & Co., requesting him to come and see her as she must alter her will. This letter was enclosed in one from a nurse saying that the matter was urgent. Mr. Taylor was away from business, and Mr. Maudling, a solicitor and a managing clerk of the firm, went in his place. Unfortunately Mr. Maudling had no previous knowledge of the testatrix's affairs, and his only knowledge of the will was derived from a perusal of it on his way to her house. He was brought to her bedside. She was nearly blind, but could write though she could not see to read. She had a paper in her hands on which she had written, amongst other names, that of Ashwin. She gave Mr. Maudling her instructions, partly from the paper and partly from her own memory. He took them down partly in shorthand and partly in longhand. Among these instructions he put down "Joan Mary altered to 4000*l.*, Maud Adelaide Ashwin 4000*l.*" His account of the matter was that Miss Philpot said the legacy given by the will to Joan Mary Ashwin was to be altered from 5000*l.* to 4000*l.*, and then said either there was to be a legacy of 4000*l.* to Maud Adelaide Ashwin, or "Maud Adelaide Ashwin 4000*l.*" He was not certain which. The judge found that whichever words were used the testatrix said nothing else about Maud Adelaide Ashwin.

The solicitor went downstairs and wrote out the codicil, brought it back, and read it to the testatrix; she twice suggested alterations, and he each time went downstairs to make them. Then he returned and read the whole codicil over to the testatrix and she signed it without further comment. He and a maidservant, who was called in for the purpose, witnessed the execution in the usual form.

It appeared that Mr. Maudling, seeing from the will that the wife of F. M. B. Ashwin was Adelaide Maud Ashwin, assumed that Maud Adelaide Ashwin must be another daughter. There was in fact no such person. Mrs. Ashwin was an intimate friend of the testatrix, but it was proved that the testatrix usually called her "Dolly," and though she knew that Mrs. Ashwin's Christian names were Adelaide and Maud, she often put them in the wrong order.

It was not questioned that the testatrix was of testamentary capacity when she executed the codicil, and the judge found as a fact that the codicil containing the words in question was read over to her, that she was capable of hearing and understanding it, and made no objection to the words in question.

Bayford, for the executors other than H. S. Knight Gregson, stated the facts as above and asked for probate of the will and codicil as drawn without any omissions. The codicil was read over to the testatrix, and it is not disputed that she was competent to make a will. Under those circumstances the practice of the Court is to admit the whole of the will and codicil to probate as executed. The burden is on those who contend that any part of the codicil ought to be omitted to prove that it was not brought to the testatrix's attention, and she had no knowledge that it was there.

Holman Gregory, *K.C.*, and *Cotes-Preedy*, for Mrs. Ashwin. When a will or codicil has been read over to a testator who is capable of understanding it, and he executes it, it is not the practice of the Court to strike out any words even though it is clear that they have been inserted by mistake. In this case it is impossible that the description of Mrs. Ashwin as "daughter of Francis Manley Bird Ashwin" was really brought to the testatrix's attention. She knew Mrs. Ashwin intimately, and could not have consciously approved her being described as the daughter of her own husband. If the Court can strike out anything it should strike out that description only. But it would probably be as much for Mrs. Ashwin's benefit if probate is granted of the will and codicil as they stand, and she is left to get the mistake corrected by a Court of construction. That was the course adopted by the Court in *In the Goods of Durlacher*. (1)

The cases of *Guardhouse* v. *Blackburn* (2), *Atter* v. *Atkinson* (3), *Harter* v. *Harter* (4), and *Collins* v. *Elstone* (5) clearly establish the general rule that when a will has been read over to a capable testator, and he has executed it, the Court cannot correct any mistake. In *Morrell* v. *Morrell* (6) and *In the Goods of Boehm* (7),

(1) (1896) 75 L. T. 664.
(2) (1866) L. R. 1 P. & M. 109.
(3) (1869) L. R. 1 P. & M. 665.
(4) (1873) L. R. 3 P. & M. 11.
(5) [1893] P. 1.
(6) (1882) 7 P. D. 68, 75.
(7) [1891] P. 247.

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where words inserted by mistake were omitted from probate, the wills had not been read over to the testators. In *Garnett-Botfield* v. *Garnett-Botfield* (1), where the testator was held to be bound by the mistakes of the draftsman, it was pointed out by Sir F. H. Jeune that it was still open to the Court to find as a fact that the will was not read over in a proper way, and so the contents were not really brought to the testator's attention, and that was the ground of the decision in *Brisco* v. *Baillie Hamilton*. (2)

Hume Williams, *K.C.*, and *Willock*, for the plaintiff. The persons propounding the will must show that every part of the will and codicil was brought to the knowledge of the testator. Mortimer's Probate Law and Practice, p. 111, shows that the testator is not responsible for words which have been inserted by the draftsman per incuriam, as the legacy to a non-existent person was in this codicil, when it is not clearly brought to the testator's attention.

The decision in the House of Lords in *Fulton* v. *Andrew* (3) has put an end to the old absolute rule that the mere reading over of a will to a competent testator decides the question. Every case must be decided on its merits.

Brisco v. *Baillie Hamilton* (2) and *In the Goods of Walkeley* (4) are strong cases in our favour. In the recent case of *Jane* v. *Jane* (5) the President corrected the date of a former will which was wrongly stated in a codicil. [They also referred to Powles and Oakley on Probate and Administration, 4th ed., pp. 16—20.]

Grazebrook, for the executor H. S. Knight Gregson.

Willis, for a party cited.

Cotes-Preedy in reply.

Cur. adv. vult.

May 22. HILL J. I do not think that for the purposes of this case it is necessary to determine the precise extent to which the observations of the Lords in *Fulton* v. *Andrew* (3) must be taken to qualify, in cases where no fraud is alleged, the effect of *Guardhouse* v. *Blackburn* (6), *Atter* v. *Atkinson* (7), and *Harter* v. *Harter*. (8)

(1) [1901] P. 335.
(2) [1902] P. 234.
(3) L. R. 7 H. L. 448.
(4) (1893) 69 L. T. 419.
(5) Only reported in *The Times*, March 30, 1917.
(6) L. R. 1 P. & M. 109.
(7) L. R. 1 P. & M. 665.
(8) L. R. 3 P. & M. 11.

For, assuming that it is no longer a binding rule, in cases where there is no fraud, or suspicion of fraud, that a capable testator who reads, or has read to him, a testamentary paper which he thereafter executes must be taken to know and approve all its contents, yet the direction which a judge should give a jury or himself must be put at least as high as this, that when it is proved that a will has been read over to or by a capable testator, and he then executes it, these circumstances afford a very grave and strong presumption that he knew and approved all the contents, a presumption which can be rebutted only by the clearest evidence. The presumption is that the words which have been read over to and then signed by a capable testator as his will do represent his will, his whole will, and nothing but his will. And if it is said that they represent his will and something more, then before that something more can be rejected as not being his will it must be established beyond all doubt that it is not his will. I do not think that any of the decisions since *Fulton* v. *Andrew* (1) involve a view of the law which is not at least as high as this. In two only of them, so far as I can discover, have words been directed by the Court to be omitted from a will definitely proved to have been properly read over to a capable testator. These are *In the Goods of Walkeley* (2) (decided by Sir F. H. Jeune, where it was proved that the draft of the will correctly mentioned in different bequests two houses, 103 and 105, Elthorne Road, and by inadvertence of the engrossing clerk the engrossment mentioned 103 in both places), and the recent case before the President of *Jane* v. *Jane* (3), where the codicil was expressed to be to "my last will dated Dec. 18, 1909," and there had been a will of that date, but the true last will was made in 1912, and the solicitor who drew the codicil had referred to the will of 1909 by mistake. In both of these cases it was established beyond all doubt what the mistake was, and how it arose and wherein it consisted. The other more recent cases are either not decisions on the point I am upon or they put the rule even higher than I have stated. In *Morrell* v. *Morrell* (4) and *In the Goods of Boehm* (5) there was no reading over. In *Brisco* v. *Baillie*

(1) L. R. 7 H. L. 448.
(2) 69 L. T. 419.
(3) Only reported in *The Times*, March 30, 1917.
(4) 7 P. D. 68.
(5) [1891] P. 247.

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Hamilton (1) Sir F. H. Jeune does not find as a fact that the draft which was sent to the testatrix was read by her, and he states that (2), "although it is quite true that the draft was sent to the testatrix, it was accompanied by a letter from the solicitor which in effect stated that there had been no material departure from the terms of the sister's will, upon which it was modelled." In *Garnett-Botfield* v. *Garnett-Botfield* (3) Sir F. H. Jeune appears to apply the rule of *Atter* v. *Atkinson* (4) in all its rigour. The cases of *In the Goods of Durlacher* (5) and *Collins* v. *Elstone* (6), which were also cited to me, do not, in my opinion, assist; in each case the testator clearly intended the particular words in question to be part of his will, though in the one case he had confused the names of his nephews and nieces, and in the other had been misinformed as to the legal effect of the words.

Let me now apply these considerations to the evidence in the present case, on the assumption that the facts I have already found are not conclusive but only very strong evidence that the words in question were known and approved by the testatrix. Has it been established that the words in question were not her will? I cannot so find. She undoubtedly intended the codicil to contain words referring to Maud Adelaide Ashwin and to 4000*l.* in connection with her. But if I am to seek her intention apart from the codicil, I am left in complete uncertainty. It would be mere guessing on the question to say that she intended to give an additional sum of 4000*l.* to Mrs. Ashwin. On the other hand when it is said that she intended to cut down the legacies of the will, she did not cut down some of them which were quite large, and it would be mere guessing to say that she intended to cut down the legacy to Mrs. Ashwin. Mr. Maudling, a few days after the death, expressed the opinion upon reflection, that the testatrix's intention was to cut down the legacy to Mrs. Ashwin, but at the time he supposed that the instructions referred to some one not named in the will. And if it is difficult to be certain what was in Mr. Maudling's mind, it is impossible to say what was in the testatrix's mind. Apart from the words of description I cannot say upon the evidence that the clause in question

(1) [1902] P. 234.
(2) [1902] P. 237.
(3) [1901] P. 335.
(4) L. R. 1 P. & M. 665.
(5) 75 L. T. 664.
(6) [1893] P. 1.

was contrary to the real intention of the testatrix. It follows that, even supposing the reading over is not conclusive, I cannot strike out the clause as a whole. Ought I to strike out the words of description only? I think not. Though I think the testatrix intended to refer to Mrs. Ashwin, yet I am left by the evidence in such complete uncertainty as to what was the testatrix's real intention with reference to the sum of 4000*l.* in connection with Mrs. Ashwin, that, in my opinion, the only safe and proper course is to abide by the words which the testatrix had read over to her and then signed. I do so the more readily because the real contention on behalf of Mrs. Ashwin is that that is what I ought to do.

I pronounce for the will and codicil as they stand.

Solicitors for executors Taylor and Ashwin: *Morley, Shirreff & Co.*

Solicitors for Mrs. Ashwin: *Wilde, Moore, Wigston & Sapte.*

Solicitors for plaintiff: *Crawley, Arnold & Co.*

Solicitor for the other executor: *H. S. Knight Gregson,* in person.

Solicitors for party cited: *Hughes, Hooker & Co.*

J. R. B.

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July 17, 24,

STOCKER *v.* STOCKER, BRICE, AND PATTERSON.

Divorce —Practice —Claim for Divorce and for Damages against Co-respondent A.—Co-respondent B. added by supplemental Petition—Decree Nisi pronounced and made absolute on Proof of Adultery with Co-respondent B.—No Trial of Case against the original Co-respondent—Abatement of Claim for Damages—Wife's Claim for Costs applied for after Decree Absolute—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 33.

Condonation by the husband would be an answer to a claim for damages against a co-respondent even if brought by a separate petition under s. 33 of the Matrimonial Causes Act, 1857; but a petition for damages does not in all cases stand or fall with a petition for dissolution of marriage.

Therefore, where a petition for dissolution was filed against one co-respondent and afterwards a second co-respondent was added and a decree nisi was obtained and made absolute on evidence of adultery with the second co-respondent without any trial of the case against the first:—

Held, that the petitioner's cause of action against the co-respondent A. for damages was not abated and A. was not entitled to have the petition against him dismissed with costs.

Held, also, that an application by the wife for her costs of the original petition was premature until the petition had been heard on the question of damages.

THIS was an appeal from an order made on June 26, 1917, by Mr. Registrar Musgrave that the co-respondent Brice should be dismissed from the suit with costs. There was also before the registrar an application by the respondent that she should be paid her costs of defending the petition herein by the petitioner, he having obtained a decree absolute in the suit of *Stocker* v. *Stocker, Brice and Patterson* on the ground of the adultery of the respondent with Patterson, who had been added as co-respondent by supplemental petition.

The following statement of the facts is taken from the judgment of Horridge J.:—

The petition was presented by the petitioner on November 12, 1913, praying the dissolution of his marriage with the respondent, Margaret Stocker, on the ground of adultery, and claiming damages to be paid by the co-respondent Brice. On December 29, 1913, the

co-respondent Brice delivered an answer denying the adultery, and the respondent also put in an answer on January 21, 1914, denying the adultery. The case was set down in February, 1914, for trial before the Court and a common jury, but on October 23, 1914, an order was made, the co-respondent Brice being called upon to go to Egypt with the Territorial Forces, that the case should stand over generally with liberty to apply.

On January 25, 1916, a supplemental petition was filed making Patterson an additional co-respondent, and a decree nisi was pronounced upon that supplemental petition. By the decree it was further ordered that the petitioner do pay to the respondent her taxed costs as to the supplemental petition not to exceed the amount paid into Court or secured for the wife's costs of hearing, but the costs of the original petition to which Brice was a co-respondent were not dealt with. On June 11, 1917, the decree nisi was made absolute.

On June 26, 1917, the order appealed from was made on the application of the co-respondent Brice, and subsequently the summons by the wife was adjourned to be heard before the judge, and both the appeal and the summons were adjourned by him into Court.

The question depended principally upon s. 33 of the Matrimonial Causes Act, 1857. (1)

(1) The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 33: "Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner, and such petition shall be served on the alleged adulterer and the wife, unless the Court shall dispense with such service, or direct some other service to be substituted; and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in Courts of common law; and all the enactments herein contained with reference to the hearing and decision of petitions to the Court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment; and the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury, although the respondents or either of them may not appear; and after the verdict has been

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Elkin, for the petitioner. The registrar decided the summons on the ground that after the decree absolute the suit was dead, because there was no longer a wife. He neglected altogether the effect of the Matrimonial Causes Act, 1857, s. 33, which provides that a claim for damages against a co-respondent " shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in Courts of common law." In the old action for criminal conversation the material question was the date of the wife's seduction. The declaration alleged " being then his wife," it made no difference that she had afterwards ceased to be so : Chitty's Precedents in Pleading, 3rd ed., pp. 55, 651.

The wife was not a party to such an action and it was not abated by her death : *Bernstein* v. *Bernstein* (1) ; *M.* v. *M. and A.* (2) The authorities show that a claim for damages against a co-respondent may fail by reason of the conduct of the husband : *Ramsden* v. *Ramsden and Luck* (3) ; *Cox* v. *Cox and Warde.* (4) None of them suggest that the claim for damages against a co-respondent fails because the claim for a divorce fails or has been fully disposed of. Under the old law an action for criminal conversation lay, though there had been a successful action against another co-respondent : *Gregson* v. *M'Taggart.* (5) The claim for damages arises out of a tort by the co-respondent. It cannot on principle be affected by the termination, successful or otherwise, of the suit against the wife. [He also referred to *Rayment* v. *Rayment and Stuart* (6), *Lord* v. *Lord and Lambert* (7), and Mayne on Damages, 8th ed., p. 584.]

Grazebrook, for the co-respondent Brice. It is not correct to say that a petitioner who claims damages under s. 33 of the Matrimonial Causes Act, 1857, is in the same position as a plaintiff in the old action for criminal conversation. The husband who recovered damages in that action got them for himself. In this Court the object

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given the Court shall have power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife."

(1) [1893] P. 292, 304.
(2) (1910) 26 Times L. R. 305.
(3) (1886) 2 Times L. R. 867.
(4) [1906] P. 267.
(5) (1808) 1 Camp. 415.
(6) [1910] P. 271.
(7) [1900] P. 297.

of damages is to make a provision for the wife and children. The whole procedure is different. There is no case where damages alone have been claimed under the present Act except *Cox* v. *Cox and Warde*. (1) The true summary of the position to be deduced from all the cases is that if the husband is not in a position to obtain relief against his wife he cannot obtain damages against a co-respondent.

W. O. Willis, for the respondent. The wife's summons for costs is quite independent of Brice's claim. The making of a decree absolute is not a final determination of the action for all purposes. It leaves it open to the wife to come to the Court to ask for alimony, or the custody of her children, or, it is submitted, for costs. *Somerville* v. *Somerville and Webb* (2), *Smith* v. *Smith* (3), *Conradi* v. *Conradi and Flashman* (4), and *Hurley* v. *Hurley and Menzies* (5) show clearly that a wife, even if guilty, may apply for her costs after the hearing under special circumstances. In this case the respondent has never been found guilty on the issue against Brice and must be presumed to be innocent. Upon the general principles of this Court she is entitled to her costs at least up to the amount deposited in Court, and in *Hurley* v. *Hurley and Menzies* (5) the Court refused to limit her costs to that amount.

Elkin in reply. There is no reported case in which a wife has been allowed her costs on an application after decree absolute, and *Wait* v. *Wait and Flower* (6) is an authority against her.

Cur. adv. vult.

July 24. HORRIDGE J., after stating the facts as above and reading s. 33 and referring to s. 34 of the Matrimonial Causes Act, 1857, proceeded as follows: The question is whether or not in a case where a petitioner has obtained a decree absolute on proof of adultery of the respondent with one co-respondent he can afterwards continue the proceedings as against the remaining co-respondent.

Before the passing of the Matrimonial Causes Act, 1857, it was competent for a plaintiff in an action of criminal conversation to

(1) [1906] P. 267.
(2) (1867) 36 L. J. (P. & M.) 87.
(3) (1882) 7 P. D. 84.
(4) (1866) L. R. 1 P. & M. 163.
(5) [1891] P. 367.
(6) (1871) L. R. 2 P. & M. 228.

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proceed against a second alleged adulterer, although he had already obtained a verdict and judgment in a similar action against another defendant: *Gregson* v. *M'Taggart.* (1)

It is to be noticed that under s. 33 a petition can be separately presented against a co-respondent although no claim is made in such petition for a dissolution of marriage, and such petition has to be served upon the wife. The question arose in *Bernstein* v. *Bernstein* (2) as to whether or not under s. 33 a defence of condonation was available as an answer to a petition for damages although in an action for criminal conversation it would only be available in mitigation of damages. The Court of Appeal there held the effect of ss. 29, 30, and 33 was that since the Matrimonial Causes Act, 1857, the defence of condonation was an answer either to a petition asking for dissolution of marriage or to a separate petition merely asking for damages against a co-respondent. In *Story* v. *Story* (3) Sir James Hannen held, where the petitioner had himself committed adultery, the petition must be dismissed both against the respondent and the co-respondent.

In my view the result of these two decisions is that s. 30, which requires the petition to be dismissed on proof of condonation, and s. 31, which gives a discretion as to granting a decree where the petitioner has been guilty of adultery, are by the Matrimonial Causes Act, 1857, made applicable to a petition claiming damages against a co-respondent. They do not seem to me to decide that a petition for damages stands or falls in all cases with a petition for dissolution of marriage, and I would point out in the case where a petition is only presented for damages, and there is no petition for dissolution, there can be no petition on which the petition for damages can depend. The sentence of the judgment of Lopes L.J. in *Bernstein* v. *Bernstein* (4), which is as follows: " I come, therefore, to the conclusion that, on the true construction of the Act of Parliament, the claim for damages is ancillary to and dependent on the petition and falls with it," must, I think, be taken to be referring to the case where there is a defence which would be an answer to the petition for dissolution. It cannot be taken to be applicable to a case where the petition is successful so as to be read to mean a claim

(1) 1 Camp. 415.
(2) [1893] P. 292.
(3) (1887) 12 P. D. 196.
(4) [1893] P. 292, 307.

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for damages is terminated where the petition for dissolution has come to final judgment. A. L. Smith L.J., referring to s. 28, says (1): "That means the alleged adulterers are to be made co-respondents if there are more than one, and it appears to me that in such circumstances the case against each is separate and distinct."

The President (Sir John Bigham) in the case of *M.* v. *M. and A.* (2) held a claim against a co-respondent did not come to an end because the claim against the respondent had abated by her death and the petitioner was entitled to proceed against the co-respondent. The learned President said: "Assuming that the petitioner has suffered damage, his claim is against the co-respondent. That claim has not abated, although the claim for divorce against the respondent has abated."

In *Ramsden* v. *Ramsden and Luck* (3) the President (Sir James Hannen), dealing with the provision as to the separate petition under s. 33, says: "There might be circumstances in which it would be legitimate on a man's part to bring this species of action. For instance, if the woman who had committed the adultery died before he could institute proceedings for a divorce, in such a case the petitioner could not ask for a divorce."

In my view condonation on the part of the petitioner would be an answer to even a separate petition for damages, and s. 31, which gives a discretion in the case of the petitioner's adultery, is applicable to a separate petition; but the right to damages is not a right which falls to the ground because the claim for dissolution has abated owing to death.

The right of action when this petition was presented, so far as it related to the co-respondent Brice, was one for a wrongful act. There was an existing wife who was then properly served, and I do not think the decree absolute against the wife with respect to another co-respondent does away with a right of action which, if established at the trial, had accrued against the co-respondent. I may point out, if this claim against the co-respondent necessarily fails because the decree absolute has been made against the wife, in a case like the present the co-respondent would be deprived of the right to vindicate his position although the action had been standing over

(1) [1893] P. 292, 311. (2) 26 Times L. R. 305.
(3) 2 Times L. R. 867, 868.

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against him and he was no party to the obtaining of the decree absolute.

For these reasons I think the appeal must be allowed and the petitioner can proceed against the co-respondent Brice.

The result of my decision on this appeal is that the wife's application for her costs must be dismissed as her costs will be dealt with on the hearing of the petition, to which she is, in my view, by s. 33 of the Matrimonial Causes Act, 1857, made a party.

The application by the co-respondent is, in my view, misconceived, and the appeal must be allowed, with costs here and below to be the petitioner's in any event.

In order that the wife's application for costs should be successful it was necessary, in my view, for her to establish that the claim against the co-respondent Brice had come to an end, and I think the right thing to do with regard to this summons and the adjournment into Court is to give no costs to either the petitioner or the respondent.

As the point decided is of considerable importance, and one upon which it would be very desirable to have the opinion of a higher Court, I give leave to appeal.

The co-respondent did not appeal.

Solicitors for petitioner: *Aird, Hood & Co.*
Solicitors for respondent: *Vizard, Oldham, Crowder & Cash.*
Solicitor for co-respondent: *C. H. Wright.*

J. R. B.

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June 29; *July* 13.

Divorce—Restitution of Conjugal Rights—Agreement before Marriage to live Separate—Indorsed Agreement of Confirmation signed immediately after, but prepared before, Marriage—Invalidity—Public Policy.

Wife's petition for restitution of conjugal rights. The husband pleaded agreement that the parties might live apart. The agreement produced was signed before the marriage ceremony, and provided that the parties might at all times after the marriage live separate and apart. This purported to be confirmed by an indorsed agreement signed by both parties immediately after the ceremony. The confirming agreement was indorsed upon the first agreement before the marriage, and the parties had at the same time agreed to execute it after the marriage:—

Held, that the two documents formed only one agreement, and, their object being against public policy, the agreement was void and afforded no defence to the wife's petition. The first document being void could not be confirmed by the second.

THIS was a wife's petition for restitution of conjugal rights. The marriage took place before a registrar on December 20, 1913. The petitioner alleged refusal to cohabit immediately after the marriage. The husband set up an agreement, signed by both parties immediately before marriage and confirmed by an indorsed agreement signed by both parties immediately after marriage, that they would live apart. The indorsed agreement was shortly expressed to confirm the agreement signed before the marriage. There was no cohabitation after the marriage, but shortly after it the petitioner gave birth to a child, of whom the respondent was admittedly the father, and whose impending birth had brought about the marriage.

The wife contended that the agreement was void as against public policy.

A. W. Baker Welford (for *T. de la Poer Beresford*, serving with His Majesty's Forces), for the petitioner. An agreement for future separation before marriage is wholly bad: *Dagg* v. *Dagg and Speake* (1); *Fisher* v. *Bridges*. (2)

(1) (1882) 7 P. D. 17.

(2) (1854) 3 E. & B. 642, 650.

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Kennedy L.J. in *Wilson* v. *Carnley* (1) states that a deed providing in futuro for the contingency of separation between husband and wife is void as against public policy. Such an agreement after marriage may be good: *Marshall* v. *Marshall* (2); *Wilson* v. *Wilson* (3); but in this case the so-called confirmation after marriage was part of the original void agreement and was prepared and agreed upon before marriage.

The Respondent, who appeared in person, elected not to give any evidence.

Cur. adv. vult.

July 13. HORRIDGE J. In this case the petitioner, Maria Brodie, sought a decree for restitution of conjugal rights, to which the respondent has put in a plea that he relies upon a written agreement drawn up and signed by both parties before marriage and signed by them after marriage whereby it was agreed that he and the petitioner should live apart. By her reply the petitioner alleges the agreement is contrary to public policy and therefore void in law.

The facts as proved before me were that before the marriage the petitioner was expecting to be delivered of a child by the respondent and pressed him to marry her, and he agreed to marry her if, and only if, she would sign an agreement to separate after marriage, and on the day before the marriage was celebrated an agreement in writing, dated December 19, 1913, was signed whereby it was agreed that after the solemnization of the marriage it should be lawful for the respondent at all times to live separate and apart from the petitioner as if he were unmarried, and the petitioner should not require or compel, or endeavour to compel, the respondent to cohabit or dwell with her by any legal proceedings for desertion or for restitution of conjugal rights or otherwise howsoever, and she would not take any proceedings against the respondent to obtain judicial separation.

The parties were married on December 20, 1913, and on the same date, at the registry office, a further agreement dated December 20, 1913, indorsed upon the previous agreement, was entered into

(1) [1908] 1 K. B. 729, 743. (2) (1879) 5 P. D. 19.
(3) (1848) 1 H. L. C. 538.

whereby it was mutually agreed between the parties that each of them thereby confirmed the terms of the within written indenture and agreed to perform and observe the covenants and conditions thereof so far as they were to be observed and performed by them respectively.

The petitioner gave evidence before me that when she went to be married she knew she was to have a second agreement, and her husband brought a copy of the agreement which he said was to be signed by them both before and after marriage. I gave the respondent an opportunity of giving evidence to contradict the petitioner with regard to the circumstances under which the agreement was signed, but he elected not to do so.

I find as a fact that the confirmatory agreement formed part of and was in no way distinct from the agreement signed before the marriage, and the two documents formed part of an agreement entered into before marriage for future separation. Such an agreement is void and against public policy: see *Cocksedge* v. *Cocksedge* (1), the judgment of Rigby L.J. in *Marlborough* v. *Marlborough* (2), and the judgment of Kennedy L.J. in *Wilson* v. *Carnley*. (3) I therefore hold the plea of the respondent is no answer to the petition.

If the second agreement is to be treated as a confirmatory agreement I think it was bad in law as being merely a confirmation of a previous illegal and void agreement. In *Brook* v. *Hook* (4) Kelly C.B., in delivering the judgment of himself, Channell, and Pigott BB., said "although a voidable act may be ratified by matter subsequent, it is otherwise when an act is originally and in its inception void."

For these reasons there must be a decree in this case for restitution.

Solicitors for petitioner: *Castle & Co.*

(1) (1844) 14 Sim. 244.
(2) [1901] 1 Ch. 165, 171.
(3) [1908] 1 K. B. 729, 743.
(4) (1871) L. R. 6 Ex. 89, 99.

J. R. B.

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